No. 11936

In the United States Court of Appeals for the Ninth Circuit

WILLAPOINT OYSTERS, INC., *Petitioner*,

v.

OSCAR R. EWING, Federal Security Administrator, and J. DONALD KINGSLEY, Acting Federal Security Administrator, *Respondents*.

On Petition to Review Orders of the Federal Security Administrator

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BRIEF OF RESPONDENTS

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Brief for the Federal Security Administrator

JURISDICTION

This is a special statutory proceeding for judicial review of an order of the Federal Security Administrator which established a definition and standard of identity and a standard of fill of container for canned oysters. The order, which is by nature rule-making in that it establishes regulations of general applicability, was promulgated under authority of Section 401 of the Federal Food, Drug, and Cosmetic Act [21 U. S. C. 341].

The order under attack was issued on March 10, 1948 [13 F. R. 1337]. The authority of this court was invoked by a petition for judicial review filed on May 22, 1948. Jurisdiction to review the administrative action exists by reason of Section 701(f) of the Act [21 U. S. C. 371(f)].

This court, after acquiring jurisdiction, issued an order under Section 701(f)(2) [21 U. S. C. 371(f)(2)] on July 7, 1948, remanding the proceeding to the Federal Security Administrator with direction to take additional evidence

relative to a new process of packing blanched oysters. As directed, the Federal Security Administrator took the additional evidence, and, within the 30-day period that was allowed, reported findings on the new evidence back to the court. These findings did not change the findings previously made but were supplementary thereto. They were made by the Acting Administrator during the absence from duty of the Administrator.

The petition for judicial review was revised and now appears in the record as Petitioner's First and Second Supplemental Petitions for Judicial Review and for an Order Permanently Setting Aside an Order of the Federal Security Administrator Establishing Definitions and Standards of Identity, Quality and Fill of Container for Canned Oysters. These petitions attack the order as issued and the supplemental findings.

The Administrative Procedure Act, 5 U. S. C. 1001, *et seq.*, does not affect the court's jurisdiction, nor does it alter the rights of review provided in the Federal Food, Drug, and Cosmetic Act.[1]

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[1] *Attorney General's Manual on the Administrative Procedure Act* (1947). The Manual states: (p. 93) "The provisions of section 10 constitute a general restatement of the principles of judicial review embodied in many statutes and judicial decisions. Section 10, it must be emphasized, deals largely with principles. It not only does not supersede special statutory review proceedings, but also generally leaves the mechanics of judicial review to be governed by other statutes and by judicial rules . . . Accordingly, the general principles stated in section 10 must be carefully coordinated with existing statutory provisions and case law."

* * * * * *

(p. 95) The introductory clause of section 10 "reads '*Except so far as* (1) statutes preclude judicial review,' with the clear result that some other statute, while not precluding review altogether, will have the effect of preventing the application of some of the provisions of section 10. The net effect, clearly intended by the Congress, is to provide for a dovetailing of the general provisions of the Administrative Procedure Act with the particular statutory provisions which Congress has molded for special situations . . ."

The Manual, citing the Federal Food, Drug, and Cosmetic Act as an example (p. 97, note 9), states: "Under such statutory provisions, the filing of a petition to modify or set aside agency action will continue to be the required form of proceeding for judicial review."

The Manual also explains that Section 10(e) "restates the present law as to the scope of judicial review." (p. 108).

STATEMENT OF THE CASE

This case, while made to appear formidable by the petitions for review, the extensive brief filed by petitioner, and the record of administrative action, involves a very simple problem. Petitioner challenges a rule-making order which identifies, defines, and regulates the minimum fill of container for canned oysters. The principal contentions are (1) that the regulation, which requires that canned oysters be so filled as to yield a drained weight of 59% of the water capacity of the container, was not made in accordance with the provisions of the Federal Food, Drug, and Cosmetic Act; and (2) that the administrative process on which the regulation was based is infected by procedural errors. We shall show that the order was regularly made in careful observance of the procedural safeguards provided by law and is supported by the evidence.

(1) *Historical Background.*

Oysters are canned commercially in three areas of the United States, the South Atlantic coastal area, the Gulf area, and in the Pacific Northwest. The markets for the food product are primarily in the mid-west and in the western states.

Interstate distribution of this food was, until 1938, subject to regulation under the Federal Food and Drugs Act of 1906 [21 U. S. C. A. §§ 1-15]. That statute contained no prohibition against slack-filled containers. In 1930, the McNary-Mapes Amendment (46 Stat. 1019) authorized the Secretary of Agriculture to establish standards of fill of container for canned foods. No standard of fill of container for canned oysters was adopted. [See 21 CFR § 1.201 et seq.]. The food Inspection Decisions (Br. App. D, pp. 35-40) which were issued long before canning of oysters on the west coast, are in no sense standards of fill of container, but an official expression by the Food and Drug Administration that canned oysters packed to yield 5 ounces of drained weight from the No. 1 EO can would not be considered adulterated in that excessive brine had been substituted in part for oysters.

Before 1942, canners of oysters in all areas filled the No. 1 EO can, the can in principal use, to yield a drained or cut-out weight of 5 ounces of oysters. In 1942 the supply of tin plate became short, and the War Production Board decided that there was wastage of tin plate in oyster canning because of the light 5 ounce fill. The Food and Drug Administration had done experimental work to determine what was a proper fill of container for canned oysters, and that work was made available to WPB. Conservation Order M-81 was issued, and it effectively denied tin plate to oyster canners except where the cans were filled to yield at least 7½ ounces of oysters from the No. 1 EO can.

Shortly thereafter, the Federal Security Administrator announced that a public hearing would be held, under the Federal Food, Drug, and Cosmetic Act, upon a proposal to establish a fill of container standard for canned oysters. Public proceedings were held in accordance with law, and on November 18, 1944, the standard was promulgated [9 F. R. 14008; 21 CFR 1944 Supp. § 36.6]. It required a drained weight of not less than 68% of the water capacity of the container (7½ ounces for the No. 1 EO can). Canners of Pacific oysters had discontinued canning in 1942. (Finding 12.) The standard was made to apply to canned oysters that averaged less than ½ ounce each, and was largely inapplicable to Pacific oysters because they averaged more than ½ ounce. (Finding 12.) That order was not challenged.

In the spring of 1946, canning operations began anew on the Pacific coast, and there soon appeared in the same markets in competition canned Pacific oysters in the No. 1 EO can with cut-out weight of approximately 5 ounces and Atlantic and Gulf oysters in the same size can with cut-out weight of 7½ ounces of oysters. The difference in amount of oysters present was known to wholesale dealers, but was not generally known to retailers or to consumers, with the result that there was likelihood of deception of consumers who would purchase the canned product on the basis of size of container alone without knowledge of the

weight differential. The existing standard gave a decided competitive advantage to canners who were not bound by it and who were using the 5-ounce fill.

(2) *The March 10, 1948, Order.*

The Federal Security Administrator's order was made upon the basis of notice, public proceedings, findings of fact, and a tentative order. The Food and Drug Administration, canners of Pacific oysters and canners of Gulf oysters participated.

a. *Standard of Identity.*

Insofar as this proceeding is concerned, the Administrator found that oysters are canned commercially on the Atlantic, Gulf, and Pacific coasts, the Atlantic and Gulf species being commonly known as "oysters" or "Cove oysters" and the Pacific species being known commonly as "Olympia Oysters" and as "Pacific Oysters." (Finding 1); that Pacific oysters are much larger and somewhat more tender than Eastern oysters (Finding 2); and that, while the basic methods of canning are essentially the same (Findings 2-3) and the canned oysters are sold in the same trade channels, consumers distinguish between them on the basis of difference in size (Finding 5). A standard of identify was established which defined the product as any one or a mixture of specified forms of oysters together with a packing medium, and salt added as seasoning. The standard provided that:

> § 36.5(c)(1) . . . the name of the food is "Oysters" or "Cove Oysters," if of the species *Ostrea virginica;* "Pacific Oysters," if of the species *Ostrea gigas;* "Olympia Oysters," if of species *Ostrea lurida.*

This provision, which appeared in the proposal made a part of the notice of hearing, was not at all disputed at the hearing or until April 29, 1948, when petitioner filed with the Administrator a petition for further hearing, reopening, revision, and oral argument. No evidence on the point was presented by Petitioner at the hearing held in response to the Court's order of remand.

b. *Fill of Container.* The Administrator's findings, reciting first the existing requirements as to fill of container (Findings 1-3), were to the effect that the 7½ ounce fill requirement to which Eastern and Gulf packers had been subject caused minor manufacturing difficulties and some changes in the oysters (Finding 3); that canned Pacific oysters packed to the cut-out weight in use prior to 1942—or 5 ounces—were not well filled (Finding 4); that sale in the same markets of No. 1 cans of oysters some of which were filled to yield 7½ ounces of meat and some of which were filled to yield only 5 ounces was a condition likely to confuse and deceive consumers who generally did not know of the difference in fill (Finding 5); that there had been no commercial packing of Pacific oysters where the cans were filled to capacity and thus no basis of commercial experience on which to determine the maximum fill which could be used without quality impairment (Finding 6); but that experimental packs were made in West Coast canneries both by canners of Pacific Oysters and by the Food and Drug Administration revealed that Pacific oysters could be packed to yield a cut-out weight of at least 6½ ounces from the No. 1 can without significant impairment of the quality of the food (Findings 6-8). Finding 6 addressed itself to the quality factors which the canners' committee had emphasized in showing quality deterioration, and was that, except for the condition called "pressure", there is no correlation between the incidence of the adverse conditions and the increased fill of container when the percent of oysters showing defects is considered. As to "pressure," it was found that the flattened area is not unsightly and does not affect the cooking quality of the food.

The Administrator concluded that it would not promote honesty and fair dealing in the interest of consumers to return to the 5 ounce fill; and that honesty and fair dealing in the interest of consumers would not be promoted by establishing separate standards of fill of container for oysters of different sizes or species. He concluded also that a 6½ ounce drained weight from the No. 1 can could

be met by all canners with any heat treatment and without quality impairment. The final conclusion was:

> On the basis of the evidence of record and the foregoing findings of fact and conclusions, and taking into account the difference between commercial canning and experimental canning, it is concluded that a standard of identity that will promote honesty and fair dealing in the interest of consumers is a standard based on drained weight of oysters, applicable to oysters of all sizes and species in cans of various sizes, requiring that the drained weight of oysters be not less than 59 per cent of the water capacity of the can."

The standard was fixed accordingly. [13 F. R. 1337].

(3) *The Remand and the August 3 Order.* Petitioner included in its petition for review, filed May 22, 1948, a motion for leave to adduce additional evidence. It represented (Pet. Rev. 14) that subsequent to the hearing in this matter it developed and put into commercial operation an entirely new method of preparing canned oysters. The method was described (Pet. Rev. 14) as a blanching method of preparing fresh-opened oysters for canning. Petitioner claimed that the record contained no evidence as to the new method of preparing oysters for canning, that the order of March 10 would preclude use of the new method, and asked the court to remand the proceeding to the Federal Security Administrator with directions to take additional evidence as to the new method of preparing oysters for canning and as to the relationship of the new method to a reasonable standard of fill of container (Pet. Rev. 19-21).

A motion for temporary stay of the March 10 order was noticed for hearing on June 7, 1948. The motion, and supporting affidavit of R. H. Bailey, also represented that the petitioner had developed a new method of preparing oysters for canning, that it wished to adduce new evidence from "skilled observers," "consumers and users," "expert testimony of scientists," and as to "practical operating results" which evidence was said to have been unavilable at the time the hearing was held. (Motion, May 22, 1948, 3-5). The affidavit suggested that peitioner's

business would be destroyed by the order, and that the order was impossible of compliance in that plant production could not be promptly converted.

The court granted the motions by an order dated June 8, 1948. The court, finding (p. 2) that the additional evidence was material and that there were reasonable grounds for failure to adduce it at the hearing, ordered the proceeding remanded "with direction to take such additional evidence (and any evidence in rebuttal thereof) as may be offered relative to the said process of packing blanched oysters, within a period of 30 days from the date of this Order on such reasonable notice to the petitioner as he may give." (p. 3). In accordance with the Act, it was ordered that the Administrator make findings and a recommendation on the new evidence. The Administrator's return was to be made within 30 days from the date of the hearing (p. 3).

On June 17, 1948, the Administrator issued a notice of hearing (13 F. R. 3376) to be held on July 7 in Washington, D. C.,

> "to receive such evidence as may be adduced by Willapoint Oysters, Inc., as to its alleged new method of preparing oysters for canning and as to the relationship of such method to a reasonable standard of fill of container, as contemplated by the Federal Food, Drug, and Cosmetic Act, for canned oysters. Rebuttal evidence may be adduced by any interested party."

The hearing convened at the time and place provided in the notice. Willapoint Oysters, Inc., the Food and Drug Administration, and representatives of Gulf and Pacific canners appeared.

While it might have been expected that the petitioner would present its case in the manner suggested in its motion for remand, it contented itself with the oral testimony of Mr. R. H. Bailey and six affidavits (Ex. 25-30). Mr. Bailey presented no testimony based upon an attempt to meet and then evaluate the 6½ ounce fill. He testified on cross-examination as follows (R. 776):

> Q. Have you ever packed, using your cannery equipment, personnel and procedure, to achieve a six and one-half fill, on any cans?
> A. No, sir.

Nevertheless, the substance of his testimony was that:

> "Our own experience shows repeatedly that it is impossible to can blanched oysters so as to comply with a 6½ ounce standard of fill without a substantial increase in the incidence of pressure, deformities and browning. A 6½ ounce fill does result in a substantial deterioration in quality for our new blanched processed oyster (R. 747).

That statement is repeated for emphasis in petitioner's brief (Br. 40).

On the other hand, the Food and Drug Administration set to work even before the court's order of remand was received to make a thorough investigation to ascertain the facts which would guide to a proper standard of fill. The day after the remand, instructions were issued to the Seattle station (R. 797-799). Blanched Pacific Oysters were packed under commercial conditions in three different plants, the only plants then in operation, to provide facts for an evaluation of the 6½ ounce fill requirement (R. 859). One of the plants was that of Willapoint Oysters, Inc.

On the basis of the evidence taken, the Acting Administrator [1] found:

a. *Standard of Identity.*[2] The commercial practice of canning Pacific oysters without pre-steaming in the shell began in the 1947-1948 season. The oysters were raw shucked, washed, immersed in a hot brine solution and there blanched for 30 to 60 seconds. They were then removed, washed, held in warm water, and canned. The treatment in the boiling brine causes raw oysters to lose water and soluble solids approximating 16% by weight. This loss is not significantly different from the loss which occurs on light pre-steaming in the shell. After processing

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[1] The Administrator was absent from duty.

[2] The modification of finding 6 apparently is unquestioned.

in the can, oysters prepared after blanching have a slightly different flavor than do oysters prepared after pre-steaming, and the liquid taken from cans of blanched oysters has more fine particles of oyster material in suspension. (Finding 2).

b. *Fill of Container.* Ten additional findings were made. The Acting Administrator found that Pacific oysters canned after blanching are no better than those canned after pre-steaming and many persons regard them as inferior because of material suspended in the liquid and because they break more readily. Blanched oysters have not been differentiated in their commercial exploitation from oysters prepared after pre-steaming (Finding 9). To attain a given drained weight of oysters account must be taken of the changes in the food which occur during preparation for and in canning, the most significant of which is the loss of liquid from the oysters during heat treatment. The total amount of liquid which separates from the oysters is approximately the same whether the oysters are packed in the container raw, given partial cooking by blanching, or partly cooked in the shell by pre-steaming. The difference is that with raw oysters the loss occurs in the can whereas in the other instances the loss occurs partly in the can and partly during the pre-can operation. The blanching loss and the light pre-steam loss approximates 16% by weight, the pre-steaming loss generally being slightly greater. The put-in weight of oysters, therefore, is not an accurate measure of fill of container and would be only if all oysters were pre-cooked to the same degree before weighing into the cans (Findings 10-14).

When a 5 ounce cut-out weight is used for blanched oysters a put-in weight of approximately 7½ ounces is necessary; and for a 7 ounce cut-out a put-in of approximately 9½ ounces is required. Thus the lighter drained weight permits a canner to replace 2 ounces of blanched oysters with 2 ounces of water (Finding 12). The liquid drained from canned oysters has food value and flavor, but it is much less valuable than the oyster meat and the

smaller the put-in weight of oysters the greater the water addition to make up the packing medium (Finding 15).

The 5 ounce cut-out can is slack-filled, and no new equipment and no significant change in canning procedure is required to meet the 6½ ounce fill (Finding 16). Based upon the number of oysters showing defects, there is no real difference beween canned oysters filled to yield 5 ounces of drained weight and those filled to yield 6½ ounces whether they were pre-steamed or blanched prior to canning (Finding 17).

Except for slight difference in flavor and appearance, the food value of the liquid packing medium is approximately the same in cans having the same drained weight regardless of the method used in preparing oysters for canning. As drained weight increases, packing medium decreases, and the flavor and food value of the liquid packing medium is inversely proportional to the amount of water added to make up the packing medium (Finding 18).

The Acting Administrator concluded that there was no basis for prescribing separate standards upon the method of preparing oysters for canning; that it would not promote honesty and fair dealing in the interest of consumers to base the standard on put-in-weight or method of preparing oysters for canning; but that it will promote honesty and fair dealing to base the standard of fill of container on drained weight without differentiation as to whether the oysters are canned raw, or are blanched or pre-steamed before canning. The standard prescribed in the March 10 order was adhered to.

ARGUMENT

Introductory. Petitioner attacks almost every finding of fact made by the Federal Security Administrator, and it contends that serious procedural errors have been made in the administrative process. The "concise summary" (Br. 73-75) reveals that the errors of substance most seriously complained of are (1) that the standard of identity unlawfully requires that petitioner's product be labeled "Pacific Oysters"; and (2) that the standard of fill of con-

tainer is invalid because it would "destroy petitioner's quality pack by requiring that an excessive quantity of its Western oysters be crammed into the can with resultant discoloration, disfiguration, distortion, and breakage."

It should be remembered that the problem facing the Federal Security Administrator was one of administrative regulation or legislation; and, as in the ordinary process of legislation, there arose the delicate problem of where to draw the line in establishing the standard fill of container. In testing the reasonableness of the line which was drawn, the issue cannot be whether it may have been drawn at some other point. Clearly, in this type of action it rarely can be established that any particular standard is impelled as the only correct one. The process of arriving at a proper regulation, like the congressional process of arriving at the terms of a statute, is not a matter of simple mathematical or logical deduction leading to a single answer. Reasonable men basing action on the same facts and findings could arrive at entirely different regulations, none of which could properly be characterized as arbitrary, whimsical, or unreasonable. The test of the validity of the regulation, if judicial judgment is not entirely to replace administrative expertise in this specialized field, must be limited to the inquiry whether the particular alternative which the administrative agency selected, among several alternatives, to achieve the objective of the Act is one which a rational person could have chosen. *Final Report of Attorney General's Committee on Administrative Procedure,* Sen. Doc. No. 8, 77th Cong., 1st Sess., 117.

The statute and the cases arising under it, establish the rule that upon review the courts are not to substitute their judgment for that of the Administrator, and that the Administrator's "judgment, if based upon substantial evidence of record and if within statutory and constitutional limitations, is controlling even though the reviewing court might on the same record have arrived at a different conclusion." *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218, 227-228.

Our reply to the very lengthy brief filed by the petitioner will be divided into three general parts. First, we shall consider the substantiality of the evidence to support the Administrator's findings. In this, we are content to rest primarily upon a sincere request that the Court consider the pages of transcript and the exhibits cited by the Administrator and Acting Administrator in order to determine that the findings have overwhelming support in the evidence. Second, we shall show that the choice of standards made by the Administrator was a reasonable one. Third, we shall meet the procedural objecstions argued by the petitioner. We shall show that the findings have ample support, and that no significant procedural error invalidates the administrative action.

A.

The Administrator's Findings are Supported by Substantial Evidence and No Evidence of Record Has Been Disregarded or Ignored.

The attack made by Petitioner on the findings and conclusions of the Administrator goes to every finding and conclusion that has been drawn. The contentions appear, under the heading "Unsupported by Substantial Evidence" (Br. 54 *et seq.*), but for the most part they are addressed either to the weight or dependability of the evidence supporing the findings or simply call attention to other, sometimes conflicting, evidence on which petitioner relies. In this there appears a thinly veiled attempt to have this court re-weigh the evidence, re-write the findings, and draw different conclusions. This, of course, the statute forbids. Cf. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 156. In this connection, it may be observed that petitioner makes no effort to consider the page references given with the findings which guide the reader to the pertinent portions of the record. Instead, petitioner insists—pointing to other pages of the record and to other exhibits—that the findings should have been made in different terms.

Petitioner asserts that the findings are slanted and distorted. An examination of the specifications which are

referred to and relied upon to support this claim, disclose that in the most part the complaint is that the findings fail to include certain of the testimony received in behalf of the canners. Petitioner has not attempted to point to any finding or any portion of any finding which is not supported by substantial evidence. All that is shown is a disagreement between the petitioner and the Administrator as to what the findings should contain. The generally accepted rule is that findings of fact should be findings of ultimate fact as distinguished from the evidentiary facts or a resume' of the evidence. 53 Am. Jur. 795; *P. H. and F. M. Roots Co.* v. *United States,* 17 F.(2d) 337 (C. C. A. 7). The requirement of essential findings does not require a impractical exactness. *Florida* v. *United States,* 292 U. S. 1, 9; *United States* v. *Louisiana,* 290 U. S. 70, 78. The detailed findings of fact required under Section 701(e) of the Act as the basis of the order are not expected to be an examiner's report.

The crucial findings appear both under standard of identity and standard of fill of container. The first is that the common name of the species *ostrea gigas,* when canned, is "Pacific oysters." The other appear in both the March 10 and the August 3 order. They are concerned with the issue whether canned oysters, packed to yield 6½ ounces of drained weight from the No. 1 EO can, are so affected in quality that the lower fill of 5 ounces is reasonable for Pacific oysters prepared for canning by a blanching process. Petitioner argues that 6½ ounces of oysters is too much for the 11-ounce can—it wishes to continue packing to yield only 5 ounces.

1. All of the Evidence Supports the Finding that the species ostrea gigas is commonly known as "Pacific Oysters" when canned.

The petitioner's brief argues that the standard of identity cannot stand because it unlawfully forces upon Willapoint's product the name "Pacific Oysters" and gives the product of the Atlantic and Southern packers exclusive rights to the name "Oysters."

The point is made that the order would "change the accepted name of the food long used by petitioner and other

West Coast packers" (Br. 8); would "confer on Southern packers a new and exclusive right to label their products by the generic description 'Oysters'" (Br. 10, 30-31); and that Finding 1 "that oysters of the *ostrea gigas* type are commonly known as 'Pacific Oysers'" is unsupported by substantial evidence "to the extent that it omits to find that oysters of the *ostrea gigas* species are and also have been 'commonly known,' 'when canned,' as 'Oysters'," (Br. 54-55, 58). It is said also that Finding 1 is in excess of statutory jurisdiction; that the conclusion that the name of the food is "Pacific Oysters" if the species *ostrea gigas,* is without the requisite findings of fact as to the 'common or usual name, so far as practicable'"; and that the Administrator's action denying Willapoint's petition of April 29, 1948, was unreasonable, arbitrary, capricious, and an abuse of discretion in failing to revise the March 10 order so as to permit petitioner to continue to use the name "Oysters" (Br. 699-70). Finally, the order is attacked as contrary to constitutional right in taking petitioner's property without due process of law by requiring it to abandon its long-continued use of the term "Oysters" (Br. 71; see also Br. 73-74).

The argument on this point appears at pages 111-113, 116-117 of petitioner's brief.

Petitioner takes up some of the page references cited for Finding 1. We respectfully refer the court to those pages to show that petitioner's criticisms are not well founded. Its treatment of the pages is distorted and unfair. Next, petitioner points out that Mr. Callaway, a Food and Drug Administration witness referred to the *ostrea virginica* as "Southern" or "Cove" oysters. It fails to mention his testimony where he testified that the common or usual name of that species "is simply oysters or cove oysters" (R. 35).

We have pointed out earlier that the proposed regulation which was a part of the notice of hearing and the tentative order issued after the hearing included provisions that the name of the *ostrea gigas* species is "Pacific Oysters." The tentative order included a finding that that species

is commonly known as "Pacific Oysters." No exception was taken to the finding or to the provision of the tentative order based upon the finding. Neither did the Mitchell petition raise the point. It was first made in the petition filed by petitioner's present counsel with the Administrator on April 29, 1948, after the final order had issued.

There is no need, however, to rest upon the failure to offer evidence or to object to the tentative order. The record is replete with evidence which amply supports the Administrator's finding and the provision of the final order.

There was testimony from Mr. Joseph Callaway (R. 16, 18, 33-35, 66, 694) and Mr. Sumner C. Rowe (R. 95), who appeared on behalf of the Food and Drug Administration, to support this finding. All of the winesses who appeared on behalf of Pacific packers called the product "Pacific Oysters" or "Pacific Coast Oysters." (Esveldt R. 380, Bendiksen R. 447, Clough R. 566, Weigardt R. 613, Bailey R. 727).

Mr. Bailey, president of Willapoint Oysters, Inc., stated (R. 522) that he was a canner of "Pacific Oysters" (See also R. 528). He agreed with Dr. Kinkaid's testimony without reservation. (R. 526). Dr. Kinkaid testified (R. 178-179) as follows on cross-examination by counsel for the Food and Drug Administration:

> Q. At the present time, are not a considerable portion of Pacific Coast canned oysters simply designated as oysters?
>
> A. I have not looked at the labels of the different ones, but I do not think that is the case. I think they are all marked with Pacific Coast oysters, as far as I know. I do not know of any that are not so designated or designated in a different way.
>
> Q. You are not familiar with the labeling?
>
> A. I have seen the label, and I have not seen any label that did not carry the Pacific Coast mark.

Petitioner mentions (Br. 112) the first question in this colloquy to show that the Government's counsel apparently knew that the common or usual name of both species of canned oysters was simply "oysters." But, characteristically, it omits the answers of Dr. Kinkaid.

Petitioner cites two examples of labeling where the name "oyster" is not qualified by the word "Pacific." Its own label, one of the examples cited, definitely marks its product as Pacific oysters, but it is true that "Pride of the Pacific" is in smaller print than is the name "oysters." (Ex. 31.)

Petitioner overlooks the fact that two labels are shown on Exhibit 32 which give the name of the food as "Pacific Oysters." One of these is the product of Northern Oyster Company. The cans are marked 79141 H(2) and (3). The other is the product of E. H. Bendiksen Co. marked "East Point Pacific Oysters". The cans are marked 79120 H(2), (3), and (14). Exhibit 27, presented by petitioner, contains cutting data on processed "Pacific Oysters." Exhibit 37 contains an affidavit of E. N. Steele in which it is stated that the *ostrea gigas* species of oysters are commonly known as "Pacific oysters".

There are two reported decisions arising under the Federal Food, Drug, and Cosmetic Act on this point. They are *Twin City Milk Producers Ass'n.* v. *McNutt,* 122 F. (2d) 564 (C. C. A. 8), and *Columbia Cheese Co.* v. *McNutt,* 137 F. (2d) 576 (C. C. A. 2).

In the *Twin City* case, the Court said at page 568:

> What was the common or usual name of the food product here involved, and whether its use in a regulation would be practicable for administrative purposes, were questions for the Administrator, on which we would not be at liberty to disturb his determination, if based upon substantial evidence . . . there could ordinarily be no arbitrariness involved in using the common or usual name of such a product for regulation purposes.

And in the *Columbia Cheese Co.* case, the Court met the contention that use of the name neufchatel cheese was not practicable. Said the Court at page 580:

> The petitioners also argue that the Administrator did not use the name, so far as it was practicable, which commonly identified the product sold; and that in the absence of a specific finding that it was not practicable

> to label their product cream cheese, the regulations identifying these various groups of cheese must fall. The practicability of one name or another name is not, of course, a matter for our judgment. Even though the name chosen would drive a healthful product from the market . . . that name or the name withheld from the product cannot be said by us to be unreasonable or improper so long as there were findings and substantial evidence to support them which justified the action of the Administrator.

Here, the food was identified under the name "canned oysters," but because of the difference in size of oysters and because the *ostrea gigas* type has utility as a frying oyster, the Administrator required that the label designate the form of the oyster component, i. e., whether whole, pieces, or cuts and whether oysters or Pacific oysters or Olympia oysters.[3]

The Administrator's action was supported by all the evidence of record.

2. There is Substantial Evidence to Support the Findings that Pacific Oysters can be Packed to meet a 6½ Ounce Drained Weight Requirement Without Quality or Appearance Impairment.

Petitioner's concise summary (Br. 73-74) argues that the 6½ ounce fill requirement of the order would result in excessive crowding of oysters in the can and with it "discoloration, disfiguration, distortion, and breakage" thereby destroying "the quality pack of Western oysters" as produced by petitioner.

The fundamental principle on which the standard of fill of container was based is that a non-transparent container—such as a can—serves not only as a packing receptacle but also as an index to consumers as to the quantity of food contained therein. It is common knowledge that as between non-transparent containers with the same amount of food, consumers will choose the one that is largest unless considerations of price impel a different selection.

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[3] See for comparison 21 CFR Cum. Supp. 27.0(6) which requires that canned peaches be labeled to specify the variety, Freestone or Cling, White or Yellow, and the form, whole, halves, quarters, sliced, etc.

The Food and Drug Administration long has operated upon the principle—accepted throughout the canned food industry—that the can should be filled to the greatest extent practicable for packing and processing without injuring the quality and appearance of the contents. Brine is a permitted addition only to the extent necessary to fill the interstices of the can and to cover the product.

Every witness at the hearing agreed that there should be but one standard of fill of container for canned oysters and the Administrator concluded that separate requirements of fill for a single sized can would likely confuse and deceive consumers. It is entirely clear that the No. 1 EO can packed to yield but 5 ounces of oysters is slack-filled. It cannot be disputed on this record that enough oysters may be placed in the can to give a 6½-ounce cut-out weight. The only question seriously presented is whether the higher drained weight results in quality impairment to an extent that would make it illegal.

The Food and Drug Administration's preparation for the hearing on proposals to fix a standard of fill of container for canned oysters began insofar as the record is concerned in May, 1945. An inspector of the Food and Drug Administration prepared a number of experimental packs of canned Pacific oysters in the Oyster Growers Service Association cannery at North Bend, Washington. The details of the work are shown in Exhibit 9 and are discussed beginning at page 97 of the record. The regular factory treatment, with two minor exceptions, was followed from the time of shucking until the oysters were packed in the cans. (R. 102.) The results show that a put-in weight necessary to attain drained weights from 6.75 to 8.46 ounces were made without difficulty (R. 107). Examination of the cans by Mr. Rowe, a witness at the hearing, showed that the oysters taken from them were normal in appearance (R. 106). No pressure in packing was required. (Ex. 9.) The only appearance defects noted were liver spots which are clearly unrelated to fill (Ex. 9(a) and (c)).

The second experimental packs were prepared in April, 1946, by another inspector of the Food and Drug Admin-

istration in the cannery of Willapoint Oysters, Inc., at Bay Center, Washington. This is discusssd beginning at page 108 of the record. The details are reported in Exhibit 10. The cans used were No. 1 tall cans, 301-411 in size. This pack was made with ordinary cannery procedure to meet a higher requirement for fill and the desired put-in weight was easily obtained without exerting pressure on the oysters. (Ex. 10.) The results showing the cut-out weights are disclosed at page 115 of the record. The appearance of the oysters was normal (R. 114), the exhibit showing that in a few instances the top oyster was flattened and in two cans there was a slight discoloration (Ex. 10(c)).

In February and March, 1947, another pack was made by Mr. Rowe and Inspectors Risley and Hansen in the cannery of the Coast Oyster Co., South Bend, Washington, now operated by the Petitioner (R. 751). These packs are discussed beginning at page 115 of the record. The details are reported in Exhibits 11 and 12 (R. 119). Both pre-steamed and raw shucked oysters were canned, and the only modification of cannery practice was an experiment with a home-made exhaust box (Ex. 11, R. 121) and in a few instances the plunger was not used.

It also appears that nine cans of the Rowe experimental pack shown on Exhibits 11-L to Q (Codes OA42, OB42 and OC42) were on hand and were opened at the hearing before the Examiner at Washington, and the drained weights determined. The results are shown at page 653 of the record.

The experimental packs show clearly that there is no difficulty under commercial practice to place in the can enough oysters that have been prepared by a reasonable method of pre-steaming so as to meet the 6½ ounce fill.[4] This point is not seriously controverted by any evidence in the record (R. 775). There is no practical difference in the results shown by the experimental packs put up by representatives of the canners. (Exhibits 14A and 15A.)

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[4] The results show that by the use of the ordinary commercial practice and with a customary pre-steaming period an 8-ounce fill will yield a drained weight of 6½ ounces with a reasonable margin of safety.

The only suggestion that this cannot be done is in the general statement that it is impossible to meet the required fill (Br. 75).

The arguable question whether there was any substantial change in appearance or quality in the experimental packs made to meet the increased fill can be determined on a realistic basis only by comparisons of cans taken from that pack with the commercially canned product having a much lower drained weight. Comparisons both by witnesses who appeared for the Food and Drug Administration and by witnesses who appeared for the West Coast industry show that so far as appearance and taste of oysters are concerned, oysters taken from the experimental packs are essentially as satisfactory as commercially canned Pacific oysters.

The oysters packed by Mr. Reed were opened and examined at the Food and Drug Administration and the general appearance observed (R. 103). In general, all had the appearance of the ordinary Pacific canned oyster (R. 106). There was no evidence of over-filling (R. 107). No browning whatsoever was noticed. (R. 664.)

The condition of each can packed by Mr. Rowe was also observed and is noted under the heading "Appearance" on Exhibits 11A to Q. These notations disclose no discoloration in a substantial number of cans, and the balance range from slight discoloration or very slight browning to brown spots and discolored oysters at the top. The discoloration or browning was noted both in the light fills and the heavy fills (R. 122).

Samples of commercially packed Pacific and Southern oysters collected by the Food and Drug Administration were examined by Rowe (R. 125). These cans were obtained upon the open market (R. 637). The results of these examinations are shown on Exhibit 21 (R. 631). The Pacific oysters were packed to yield a drained weight of 5 ounces, and the Southern oysters to yield a drained weight of 7½ ounces. The cans of Pacific oysters were in no instance full of oysters, while the cans of small oysters were generally well filled. When the cans were not full of oysters

the oysters were replaced by liquid. The quality of the commercially packed Pacific oysters referred to on Exhibit 21 was in no way superior to that of the experimental packs on which the drained weight was 7 ounces or more (R. 125). The information on Exhibit 21 also discloses that the cans contained about one-half oyster meat and one-half liquid. A typical example is discussed at page 635 of the record. The can contained 5.33 ounces of oysters and 5.47 of liquid. Another can held 4.44 ounces of oyster meat and 5.44 of liquid. On the average those cans which disclose approximately 5½ ounces of oysters contained as much liquid as oyster meat (Exhibit 21).

The basis of the petitioner's claim that a serious impairment in quality will result when drained weights in excess of 5 ounces are used in the so-called "demerit" system which was devised by representatives of the canners for the purposes of this case. The result claimed for the system is disclosed on Exhibits 14 through 20 which tend to show quality deterioration as the pack increased from a 6½ ounce fill-in weight to a 10 ounce fill-in weight.

These exhibits, together with the oral testimony of Clough and Esveldt, were said to reveal appearance and quality deterioration due to the increased fill. Deterioration was found by the application of a system which consisted of giving demerits of various numbers for factors chosen by these witnesses. The reasons for giving the precise number of demerits in each instance were not explained, and they were of necessity arbitrarily assigned. But after exhibits 14 through 16 were offered, the evidence which was developed on cross-examination showed it impossible to relate any of the grading results as shown on the deterioration tables to any can as shown on the summary of the laboratory pack. The exhibit simply did not contain the information (R. 573).

To meet the situation, some work sheets were offered by the Pacific canners and Exhibit 19 was prepared and placed in evidence by them. For all practical purposes Exhibit 19 is a comprehensive summary of, and super-

sedes, the material in the preceding exhibits in that it contains all information in such exhibits, but is much more detailed as to each can.[5]

Exhibit 19 reveals the fallacy of the demerit system. Analysis of all the data contained in that Exhibit shows that there were no significant changes in the factors noted that could be attributed to fill. A tabulation has been made of the total number of oysters and the total drained weight of each pack as tabulated on Exhibit 19 in respect to the fill-in weights from 6½ to 8½ ounces. From these figures the percent of oysters and the number of oysters per ounce of drained weight which exhibited each of the characteristics has been noted. The results are summarized in charts attached to this brief as Appendices A & B. The charts show very graphically that an increase in fill from 5.4 ounces of drained weight to 6.9 ounces of drained weight did not result in a greater number of broken oysters, in additional oysters showing browning, or in more twisted oysters. The graphs show that there was a slight increase in the factor called pressure. The packs having 5.4 ounces average drained weight have 2.2% of the oysters showing pressure while the packs having an average drained weight of 6.6 ounces have 7.1% of the oysters showing "pressure." The graphs indicate a trend in the number of oysters that were twisted, as this number seemingly increases with the increased fill. The differences, however, are not statistically significant because of the large variations between the packs within each level of fill and the large amount of overlapping between the number twisted on the lower fills and the number twisted on the higher fills; for example, one pack of 7 cans of oysters with an average drained weight of 6½ ounces had no oysters twisted, whereas a pack of 12 cans with an average drained weight of 5.4 ounces had 18% of twisted oysters.

It is conceded by a witness for the canners that the 8 experimental cans shown on the top line of Exhibit 15 with

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[5] Exhibit 19 is a summary taken from work sheets. It is in every sense comparable to Exhibit 33 to which petitioner seriously objects.

an 8-ounce fill-in weight and the average drained weight of 5.21 ounces represent good commercial practice (R. 397, 398). Yet it appears that in these 8 cans were found 3 broken oysters and 3 twisted oysters. The witness explained the situation as due to the high count of oysters. (63 oysters as shown on Exhibit 17, page 3). Other examples may be shown.[6]

There is abundant evidence in the record to sustain the finding of the Administrator to the effect that there is no significant correlation between the incidence of these so-called demerit conditions and the drained weight, when the percent of oysters showing defects is considered instead of the sum of "demerits" per can. (Finding 7, Petitioner's Appendix A, page 10.)

The authors of the demerit system frankly admitted that it is entirely new and untried and was devised by them during the course of the examination of the experimental packs without any idea of showing what the actual commercial quality of the packs might be. (R. 214.) It is conceded that the choice of the comparative scale of demerits was entirely their own (R. 241), and that the assignment of a certain number of "demerits" to a certain condition was based solely upon opinion as to their comparative value and was entirely arbitrary (R. 240). The system was not devised to show what the consumer concept of the canned oysters might be. It was not the purpose to meet a qualitative definition. Discolorations which frequently occur in canned oysters other than browning, such as liverspots, were discarded although there may be confusion in the cause of the discoloration (R. 238, 239, 684). It is said that the black area on the mantle of the Pacific oyster, far from being a discoloration or a disadvantage, is

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[6] The packs of medium size oysters shown on Exhibit 19 indicate that the percentage of broken oysters is greater at the 6½ ounce fill-in weight than at the 7½ ounce and 8 ounce fill-in weights. The percentage of broken oysters at the 8½ ounce fill-in weight appears to be only slightly more than at the 6½ ounce fill-in weight.

in fact a healthy characteristic of the oyster (R. 732).[7] No account was taken of other factors which are considered in grading oysters from a commercial standpoint, and the system has no similarity to the grading of any other sea food (R. 273). The purpose of the experiment was to search for objectionable characteristics resulting from the increased fill of container and no attempt to correlation to commercial grade was obtained (R. 386, 395, 680). It could not be carried over into commercial grading of oysters (R. 269). The vulnerability of the test was conceded (R. 240).

Petitioner's Specifications of Errors No. 22 through 27 attack Finding 6 of the March 10 order (Br. 60-61). There appears to be no assault on Finding 17 of the supplemental order in so far as it states "Based on the number of oysters showing . . . defects, there is no real difference between canned oysters filled to yield 5 ounces of drained weight and those filled to yield 6½ ounces drained weight whether oysters were pre-steamed or blanched." Assignment 22 complains because Finding 6 omitted to show that experimental packs sponsored by canners of Pacific oysters reveals a serious impairment of quality when drained weights in excess of 5 ounces were used. As we have pointed out, a careful analysis and evaluation of the evidence offered by the canners, including their exhibits, shows that there was no significant change even in the factors which they emphasized as evidencing deterioration, with the single exception of the factor called "pressure."

This specification also complains of the finding that the number of demerits given was made on an arbitrary basis. We have pointed out that the evidence shows without dispute that the demerits assigned were arbitrarily chosen and without reference to the true quality of the pack or to the commercial acceptability of the product.

Specification 23 complains of Finding 6 in so far as it finds to the effect that browning can be eliminated by the

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[7] But see testimony of Esveldt (R. 679-680) to the effect that the black mantle always has been a problem of the industry, affects quality, but was not taken into account in the demerit system.

removal of excess entrapped air. The finding is not in those terms. The Administrator found that browning "is related to the amount of entrapped air in the can at the time of closure. Excess entrapped air can be avoided in good manufacturing practice." This finding is supported by all of the evidence. The specification also claims that the finding erroneously suggests that liverspots are normally in Pacific oysters. The witnesses for the canners testify that liverspot discoloration and the dark mantle on Pacific oysters are among the greatest problems of the industry. (R. 163, 173, 539, 680, 732).

Specification 24 complains of Finding 6 in so far as it states that pressure marks are not unsightly. This finding has ample support in the record (R. 984, 985) and is not overcome by the contrary statement cited by the petitioner. Since there had been no cans of Pacific oysters filled to capacity, the condition called pressure naturally has not been encountered and there has been no showing that the consuming public is aware of the condition or that it would be taken into account in evaluating the canned product.[8] There is no substantial evidence that pressure causes any substantial impairment in quality.

Specification 25 complains of Finding 6 in omitting to show that the Pacific oyster is susceptible to breakage. It is not denied that the Pacific oyster is susceptible to breakage (see Finding 2 of Definitions and Standards of Identity). Finding 6 simply is to the effect that breakage does not increase as the fill increases.

Specification 26 complains of Finding 6 in so far as it states that there is no significant correlation between the various blemishes and the drained weight of oysters. The finding is not in those terms. It states "except in the case of the condition called pressure, there is no significant correlation between the conditions" [browning, twisting, breaking, and tearing]. As we have shown, a careful evaluation of all the evidence reveals that the realistic incidence of

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[8] Dr. Clough testified (R. 247) that consumer probably would not prefer to have an oyster that was flat on one side replaced by water. Exhibit 27 notes "pressure" but does not mention it as adversely affecting quality.

these conditions does not increase as the fill increases and that oysters can be filled to yield a cut-out weight of at least 6½ ounces without significant impairment of the quality of the oysters.

Specification 27 complains that Finding 6 failed to take into account the affidavits offered by petitioner as Exhibits 28, 29 and 30. Since those exhibits were not in the record when Finding 6 was made, it is logical enough that they were not taken into consideration. However, the exhibits were fully considered before the supplemental findings were made. The Consumers Acceptance Test involved the sampling of oyster stew and fried oysters prepared from three brands of canned oysters, blanched and pre-steamed Pacific oysters from 5-ounce packs, and Southern oysters from a 7½-ounce pack. No Pacific oysters with increased drained weight were involved. While the comparative quality of oyster stew and fried oysters prepared from the different commercial packs may be a legitimate competitive factor in the industry, it fails to cast any light on the effects of the increased fill of container and is wholly immaterial to the inquiry.

The finding referred to in Specification 28 refers to raw oysters and not pre-steamed or blanched oysters.

Specifications 33 and 46 complain of a failure to find that the liquid from blanched oysters has a significant food value.[9] It is an admitted fact that the consumer prefers the oyster. (R. 447, 447a.) After all it is the oysters rather than the liquid that the consumer buys and for which the standard is being fixed.

Specifications 43, 44 and 49 complain because the standard will require a larger fill-in weight of Pacific oysters and permit a smaller fill-in weight for eastern oysters with a corresponding increase in the amount of added liquid. The net result in either case is that the consumer will get the same amount of "oysters."

The evidence at the first hearing included testimony and exhibits with respect to (a) canned oysters packed after pre-steaming and (b) canned oysters prepared from raw

[9] See Findings 6 (Identity) and 15 (Fill).

shucked oysters without prior heat treatment. The Administrator concluded, upon consideration and careful evaluation of all of the evidence, that the 6½-ounce fill of container requirement was reasonably calculated to promote honesty and fair dealing in the interest of consumers and could be met without quality impairment of the canned product. On application of the petitioner, the Court ordered the proceeding remanded for the receipt of such evidence as the petitioner might produce.

We previously have pointed out that petitioner presented at the second hearing no container studies made on its own behalf. Exhibit 27 included an evaluation by Dr. Clough [10] and Mr. Willet. This exhibit grades the canned oysters according to the demerit system which the Administrator found not reasonably related to trade or consumer concepts of quality. The exhibit makes no comparison of the 6½-ounce fill canned product with the commercially produced food. It, therefore, does not show that increasing the fill to 6½ ounces drained weight results in quality or appearance deterioration.

The day after the remand by this Court the Food and Drug Administration set to work to get the necessary factual evidence to show whether the 6½-ounce fill could reasonably be met with the new blanching process. The Administration's representative went to the petitioner's plant first. The inspector was not permitted to make the necessary packs there at that time. He carefully observed the blanching process in use. An average put-in weight of 7.42 ounces was being used. The cans appeared to be slack filled. Twelve cans of labeled stock were obtained and sent to the Food and Drug Administration. (R. 854-855, 858). The representative then proceeded to the cannery of the Northern Oyster Company, Oysterville, Washington (R. 859). That company was using the blanching process developed by petitioner (R. 859), and the inspector was allowed to prepare an experimental pack. The details are discussed beginning on page 860. The packers encountered

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[10] Dr. Clough (R. 675) stated that he was not familiar with commercial quality of canned oysters.

no difficulty in making the necessary put-in weight (R. 861), and the packs were made without change in the regular cannery practice except for the addition of extra oysters in the cans. A sample of the 5-ounce commercial pack was taken at the same time (R. 862, 863). At the time of preparation of the experimental pack, data was obtained to show the loss in liquid and solids that occurred during blanching (R. 863).

On June 11 an experimental pack was made under commercial conditions at the E. H. Bendiksen plant at Ocean Park, Washington. The details are reported at page 863 of the record. Loss during blanching was determined (R. 866). The pack was made without difficulty (R. 866). For comparative purposes, one case of the company's commercial blanched canned oysters and one case of commercial pre-steamed canned oysters were taken (R. 867). Certain chemical determinations were made in the Seattle laboratories of the Food and Drug Administration (R. 868).

Finally, on June 16 arrangements were made for the production of an experimental pack in the petitioner's cannery (R. 868-869). The record (R. 869) includes the details of this pack. Weighings before and after blanching showed a 14% loss in weight during the blanching process (R. 870). The packer encountered no difficulty in making the necessary weights, and the cans went through the process without incident (R. 870, 1120). For comparative purposes, one case of the regular commercial pack was taken from the same retort tray (R. 872), and another sample of the five ounce commercial production was taken. Chemical determinations were made in Seattle (R. 875).

All of the plants were using a put-in weight of 7¼ ounces. A put-in weight of 9¾ ounces was used for the experimental pack. Otherwise, the regular plant method used at each plant was followed and in each case the procedure followed was as near as could be to that used at the petitioner's plant. No changes in equipment were required (R. 859-876). The packing of the oysters at the put-in weight of 9¾ ounces was accomplished in accordance with

the usual methods by the employees of the plants without any difficulty (R. 859, 861, 866, 869, 870, 871). A 12-can sample of each of the experimental packs was sent to the Food and Drug Administration, together with samples of the regular commercial pack from each of the plants.

The inspector then selected one sample of five ounces pre-steamed canned oysters (Bendiksen), one sample of five ounce blanched canned oysters (Willapoint), and one sample of 6½ ounce blanched canned oysters for display to purchasers (R. 877-879). The buyers, with one exception, preferred the pre-steamed oysters (R. 879). They saw no deterioration in quality attributable to the increased fill (R. 880-881).

The samples put up and collected by the inspector at the plants referred to, together with his report showing the manner by which the samples were obtained, were received by the Food and Drug Administration and the samples examined as to odor, taste, and appearance, by Mr. Calloway, Mr. Rowe, and by three chemists employed in the Food Division (R. 799). Nine cans of each sample were examined to determine the drained weight, the weight of the liquid in the can and the number of oysters in each can. The characteristics, such as browning and the number of twisted and broken oysters were noted (R. 808, 809, 814, 821, 822). Three cans of each sample were chemically examined to determine the contents of solids, ash, salt and protein. The results of these examinations, together with the report received from the inspector as to the put-in weights are shown on Exhibit 33 (R. 799-816).[11] Mr. Calloway testified as to the details of the examinations. The other participants in the examination, however, were present at the hearing and were placed upon the stand for

[11] Exhibit 33 discloses the results of the examination of the experimental packs put up by Mr. Hansen at the following plants: Northern Oyster Co., F. S. No. 79-118-H. E. H. Bendiksen Co., F. S. No. 79-119-H. Willapoint Oyster Inc., F. S. No. 79-144-H. Also the results of the Examination of the regular commercial packs obtained by Mr. Hansen as follows: E. H. Bendiksen Co., F. S. 79-120-H. Northern Oyster Co., F. S. 79-141-H. Willapoint Oysters, Inc., F. S. 79-142-H and F. S. 79-145-H.

cross-examination by Mr. Stephan. He chose not to ask any questions as to the details of the examinations. The only objection to the exhibit was that the original records were not present (R. 817). The record shows, page 858, that all such original records were made available to counsel for petitioner for cross-examination.

As shown on Exhibit 33, the conclusions of the chemists who examined the packs were that the high fill did not result in any significant increase in broken oysters, twisted oysters, or browned oysters (R. 821-822, 824-825, 829). Both by chemical analysis and by organoleptic examination, the blanched oysters were determined to be for practical purposes indistinguishable from oysters prepared from the pre-steaming method (R. 800, 802, 824-825, 829-831). The blanched oysters packed to cutout weights well above 6½ ounces were indistinguishable from presteamed oysters in odor, taste, and appearance. The liquid portion of the blanched canned oysters was less attractive (R. 800). Cans filled to yield only five ounces of oyster meat were slack-filled (R. 803, 854, Ex. 32). When the liquid was removed, the oysters occupied only a little more than one-half of the space in the cans (R. 806, 808, Ex. 32).

The record shows that blanching as ordinarily practiced has essentially the same effect on oysters as does pre-steaming (R. 827-828). In both processes the oysters are partially cooked and some liquid is lost. An additional amount of liquid is added in both processes. The consumer gets a product which is indistinguishable as far as the oysters are concerned. When the put-in weight is sufficient to yield a drained weight of 6½ ounces, the water added amounts to from 1½ to 2 ounces. When 7½ ounces are put in the can to yield a drained weight of 5 ounces, about 3½ ounces of water are added to the can. When less water is added there is a slightly higher concentration of solids and the liquid has a stronger taste (R. 829-831). The liquid taken from cans prepared by either method is approximately the same in solids and ash (R. 823) even though a slight amount more liquid occurs in cans pre-

pared from blanched oysters. The principal element of food value in the liquid is glycogen (R. 827-828).[12]

Statistical analysis of the data compiled on Exhibit 33 is graphically set forth in Appendices C and D.

This shows a comparison of the cans filled to yield 5 ounces with cans filled to yield 6½ ounces and reveals that there was no significant difference in the occurrence of broken oysters, browned oysters or twisted oysters nor in the number of oysters showing pressure.

Two cans of each sample were cut, the liquid drained and the cans photographed. These photographs are in evidence as Exhibit 32 and graphically reflect the fill of the cans. Cans not photographed were substantially identical.[13] The examination disclosed that the experimental packs had several cans with drained weights over 7 ounces, and that for practical purposes 6½ ounces is a reasonable well filled can but is not filled to capacity (R. 831-832).

A comparison may be made between commercial packs of blanched and pre-steamed oysters and between the commercial packs and the experimental packs. At the Bendiksen plant, the liquid in the cans is very carefully controlled and was at a high level. Very little browning is shown in any of the cans. The weight of the liquid in the cans of both commercial packs exceeded the weight of the oysters. The chemical analysis of the two commercial samples discloses that the liquid and the oysters contain practically the same proportion of solids (822, 823). It was found that the loss of weight of oysters during the blanching process ranged from 17.2 per cent at the Bendiksen plant to 14 percent at petitioner's plant. This demon-

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[12] The commercial packs of blanched oysters shown on Exhibit 33 disclose that the average amount of liquid per can is more than the average drained weight of the oysters.

[13] The origin of the cans represented by Exhibit 32 may be determined by the code numbers shown on the lid of each can in the photograph. Code number 79118 H, 79119 H and 79144 H represent the experimental packs with drained weights calculated at 6½ ounces. The others represent commercial packs with drained weights calculated to yield 5 ounces.

strates that blanching has essentially the same effect as pre-steaming, which is further verified by an examination of the brine used for the blanching (R. 825, 826).

The petitioner, as we have pointed out, does not challenge the essentials of Finding 17 of the supplemental order. Instead, Willapoint attacks the entire order claiming that it is void because the Acting Administrator placed reliance upon Exhibit 33 (Br. 100). The petitioner argues (1) that Exhibit 33 is unworthy of credit because it is entirely inconsistent with Exhibit 27 offered by petitioner, the greatest inconsistency being in reports of the element of browning (Br. 97-98); (2) that cross-examination of Mr. Callaway as to another pack developed inconsistencies which cast grave doubt upon the trustworthiness of Exhibit 33 (Br. 98-99); and (3) that the work sheets underlying Exhibit 33 reveal that the exhibit is "honey-combed with error" (Br. 96). Petitioner asserts that Exhibit 33 should have been rejected in the absence of work sheets.

The simplest answer, perhaps, to all such argument is that it goes to the weight of the evidence and not to its admissability. And it was for the Administrator to resolve any conflicts in the evidence and to decide whether the testimony of witnesses who appeared at the hearing should be believed. *Land o'Lakes Creameries* v. *McNutt,* 132 F. (2d) 653, 658 (C. C. A. 8); *National Labor Relations Board* v. *Reeves Rubber Co.,* 153 F. (2d) 340, 342 (C. C. A. 9).

The alleged inconsistency with the testimony of Dr. Clough is certainly not sufficient to negative the entire examination made by several witnesses in the Food and Drug Administration. Dr. Clough's evidence appears in Exhibit 27, which is an affidavit reporting joint results by Dr. Clough and Mr. Willett. Dr. Clough stated that he was not familiar with the commercial aspects of quality of canned oysters (R. 675). Dr. Clough made no comparisons as between the cans filled to yield 6½ ounces and the regular commercial products. Insofar as the record shows, the deficiencies noted by Dr. Clough and

Mr. Willett in Exhibit 27 occurred with equal frequency in the products of commercial manufacture collected at the same time the experimental packs were made.

The petitioner attempts to make much of alleged inconsistencies in the testimony of Mr. Callaway as to a pack of oysters made at the cannery of the Northern Oyster Company (Br. 98-100). It complains that the findings failed to mention inconsistencies developed on cross-examination (Specification 42; Br. 65-66). Again, we should say that the complaint goes to the weight of the evidence and the credibility of the witness. However, no essential inconsistencies in the testimony were developed on cross-examination. During the course of his lengthy cross-examination, petitioner's counsel developed nothing of more significance than that Exhibit 33, prepared under Mr. Callaway's direction, reported the word "oysters" rather than "oyster", and that the words "no defects noted" were reported rather than "OK" or "OK picture" which appeared on the work sheets (R. 925-934, 938, 944, 998). In any event, these apparent discrepancies were fully developed and a complete explanation made before the record reached the Acting Administrator. He evaluated the evidence after the petitioner's points were made.

There was certainly no unfairness in restricting the cross-examination. The presiding officer was unusually lenient in permitting Mr. Stephan to follow lines of interrogation that had no purpose other than to cast confusion and misunderstanding into the record.

Petitioner argues that the work sheets underlying Exhibit 33 reveal that the exhibit is "honey combed with error", and it asserts that the exhibit should have been rejected in the absence of the work sheets.

So that there will be no misunderstanding, the so-called work sheets were the papers used in the laboratory to record the information originally. The material then was transposed to Exhibit 33. This exhibit was called a master sheet by the witness, but it is exactly the same in kind as Exhibit 19 which Pacific canners designated as a work sheet. The so-called work sheets made in the laboratory

were made available to counsel, and he was permitted to use them throughout his cross-examination (R. 1000). Nevertheless, he claims that the order should be set aside because the laboratory work sheets were not put in evidence. We respectfully submit that no prejudice to petitioner has been shown by reason of the refusal to admit the work sheets in evidence.

In addition to the work sheets, petitioner was given ample opportunity to cross-examine each of the chemists who participated in the examination and evaluation of the cans of oysters (R. 1011, 1013, 1015). He chose not to examine those participants. Rather, he sought to leave in the record an inference that the men were underlings subject to the will of Mr. Callaway (R. 952-953). There is no support for such inference and the only logical reason for petitioner's failure to examine the witnesses is that counsel knew that their evidence would strongly corroborate that of the witness Callaway.

If needed, there is further corroboration of Mr. Callaway's evidence in the detailed chemical results reported, and in the evaluation of the packs by large scale buyers.

Another argument, along the same lines, is that the examinations reported in Exhibit 33 are without weight because the method of examination used was faulty (Br. 105-107). The contention is that an organoleptic examination cannot be used unless made in the manner suggested in *McGraw-Hill Series in Food Technology, Flavor* (1945), Ch. 11, p. 98.

Simply to state the proposition is to refute it. The witness explained why he considered the technique there employed as inapplicable to this test (R. 890-899). The principal objection seems to be that each participant failed to record, secretly and separately, his evaluation made by organoleptic means (Br. 106-107).

There is, of course, no support in the record for the wild statement that a casual and random study was made. The very unfairness of the charge is revealed in the quotations and pages cited by petitioner in his brief. While the witness stated honestly that the different participants

may have skipped around and that no regular sequence was followed, he testified also that the opened cans and trays of oysters were so arranged on the table as to maintain identity (R. 892) and that there was no mixing up of cans or dishes (R. 896). The witnesses could not testify precisely what the other participants did (Br. 106), but the participants were available to give that testimony if it were desired. Petitioner quotes from Mr. Callaway to leave the implication that the test was faulty in that the participants failed to rinse their mouths between samplings (Br. 106). The quotation is as follows, and we have italicized the part which petitioner leaves out:

> *I will be glad to add* in any number of cases it is customary to wash the mouth out between tasting, where there is a very strong tasting *material involved which tends to kill the taste.*
> *That is not the case with oysters, and it was not necessary to wash out the mouth between the tastes.*

Petitioner conveniently ignores the fact that two of its quality evaluations were made without separate recording of results, detailed data on work sheets separately recorded, and with the alleged possibility that one participant might influence the decision of the other. Mr. Bailey testified that the blanching process was developed upon the basis of quality evaluation made by himself and his plant superintendent, Lynn Hayes (R. 770). Exhibit 27 shows joint results reported by Dr. Clough and Mr. Willett. No separate observations were recorded.

Petitioner seeks to bolster this point of its argument by reference to Exhibit 28 (Br. 107-110), which it asserts was totally ignored. The exhibit was specifically mentioned in Finding 15, and the order clearly recites that the findings were made upon the basis of the evidence of record.

But Exhibit 28 does not prove, by any stretch of the imagination, that petitioner's blanched oysters are better in quality than would be the same oysters canned after pre-steaming. No such comparison was made. The comparison was between the pre-steamed oysters of another Pacific packer, the pre-steamed oysters of a Southern

canner, and the commercially canned product of Willapoint. The comparison was made after the foods had been cooked as oyster stew and as fried oysters. At its very best, the exhibit simply shows that there were slight differences in the appearance, texture, and flavor of the three products. Taken at its best, it shows nothing more than a conflict in the evidence. There is no rule of law that a conflict of that kind requires the Administrator to take the affidavit to the exclusion of other competent and convincing evidence. Certainly, the order is not voided because the exhibit was not given controlling weight, and there is no basis for the claim that the evidence was ignored when the findings show affirmatively that the exhibit was considered.

Petitioner attempts to make it appear that the methods of canning Gulf oysters and Pacific oysters are so radically different as to require separate standards of fill of container (Specifications 7-8, Br. 55-56). This has no support in the record. The basic method of canning is the same, and variations in the amount or manner of treatment before placement in the cans do not change the essentials. The food is a cooked product which has lost part of its liquids by heat treatment.

Petitioner complains (Spec. 43, 44, and 48; Br. 66, 68) that Finding 12 is not supported by substantial evidence insofar as it states that the 7½ ounce put-in weight necessary to achieve a 5-ounce cut-out weight for canned Pacific oysters permits a canner to replace 2 ounces of blanched oysters with two ounces of water. The complaint is that

> "with studied design it ignores the fact that the order outstanding would require petitioner to put 9 ounces of oysters into its can and 1½ ounces of water to yield a drained weight of 6½ ounces . . . whereas under the existing order with respect to steam-opened Southern oysters, Southern producers are permitted to reduce the amount put into the can from . . . 7½ ounces to a new standard of 6½ ounces of oysters, and to increase the amount of water added to the can from 3 ounces previously authorized to 4 ounces" (Br. 66).

The findings explain in considerable detail that the difference in put-in weight is without significance to the consumer. The Acting Administrator found that the put-in weight of oysters, because of variable losses which occur in the can during processing, is not an accurate measure of fill of container for canned oysters, but would be if all oysters were pre-cooked to the same degree before weighing into the cans (Finding 14). Findings 10-13 explain that the total amount of liquid separating from oysters is approximately the same regardless of the processing method used. In the case of blanching and pre-steaming, part of the loss occurs before the oysters are placed in the cans and the remainder of the separation takes place in the can when it is processed. The pre-can loss is approximately the same with blanching as practiced by Willapoint and with the ideal light pre-steaming employed by other Pacific oyster canners. When oysters of any type are heavily pre-steamed or heavily blanched, there is little loss of liquid during processing (R. 877, 1143) and cut-out weight approximates put-in weight.

The Pacific oyster is larger in size, and the pre-steaming that is necessary to cause the shells to open causes a loss of liquid that approximates 16%. The remainder of the loss occurs in the can. Blanching, as practiced by Willapoint has the same effect (Ex. 33).[14]

So far as the consumer is concerned, the loss prior to canning is of no consequence. Regardless of the heat treatment given, or the lack of such treatment, the amount of oysters in the can when it is opened is the important consideration. The consumer in either event gets 6½ ounces of oysters and the remainder of the can contains liquid. The difference is that all of the liquid is driven

[14] Petitioner insists that the blanching loss is approximately 3%, and it cites in this respect Exhibit 28 (more specifically Appendix "A" of that exhibit). These figures conflict with the results obtained by the Food and Drug Administration. A possible explanation could be found in the fact that Exhibit 28 reports in terms of "volume." But Mr. Bailey explained that the result was obtained by weighing the oysters before and after blanching (R. 792), which was the same method used by Inspector Hansen (R. 863, 866, 870). See Assignment 40, Br. 65.

out of the Southern oysters during pre-steaming and they suffer no loss in the cans, whereas the blanched Pacific oysters (and pre-steamed Pacific oysters) have lost only part of their liquid before going into the cans and lose the remainder in the cans. The Administrator concluded, and properly so, that competing canned oysters packed in the same sized can but filled to yield different amounts of oyster meat is a condition likely to result in deception and confusion of consumers.

Petitioner, however, attempts to justify the 5-ounce fill by stating that the liquid portion of the canned oysters has significant food value. The findings recognize this fact (Finding 15) [15] but also recognize that the liquid is of much less value to the consumer than is the oyster meat. Whatever food value the liquid has, the product contains more of it if less water and more oysters are put into the cans (Finding 18).

Petitioner argues that the food value of the liquid in its product is superior. Its own Exhibit 29 compares the food value of the liquid from its commercial product with that drained from a can of Southern oysters. The difference, by that analysis, is .85% in protein and 3.68% in solids. But in terms of ounces, the protein difference is seven hundredths of an ounce; and the solids difference is twenty-eight hundredths of an ounce. The percent of protein in the oyster meat is approximately 17% as against approximately 2.5% in the liquid (Ex. 33). So the meat is much to be preferred if food value is the test to be applied.

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[15] Petitioner insists that the Administrator erred in failing to find and conclude that the packing medium of its product has flavor and food value (Specifications 17, 33, 46, 49; Br. 58, 62, 67, 68). Finding 6 of the March 10 order states that the liquid has an oyster taste and is useful in making oyster stews, but is usually discarded if oysters are used for frying, although it may be used for food in some other way. This is supported by Exhibit 28, of which Petitioner makes much. Findings 15 and 18 of the supplemental order discuss the food value and flavor of the liquid packing medium.

3. The Increased Fill Does Not Result in Poor Quality Due to Excess Clipping at the Closing Machine.

There was no point made at the first hearing to show that the increased fill would result in poor quality due to excessive clipping of oysters at the closing machine.

That point was introduced at the second hearing by a representative of E. H. Bendiksen & Company (Ex. 37). The Acting Administrator found (Finding 16);

> Sometimes a portion of the top oyster is clipped off by the sealing operation. This frequently occurs with a fill designed to yield 5 ounces drained weight but the relative incidence of clipping between a fill designed to yield 5 ounces and one devised to yield 6½ ounces is not shown by the record.

Petitioner claims, as usual, that a vital exhibit was ignored (Specification 47, Br. 67) which shows waste and destruction of oysters due to an excessive 6½ ounce fill. The record references cited for the finding show that the point was not ignored.

The testimony of Mr. Bailey is particularly pertinent on this issue, and shows an opportunistic change of testimony in an attempt to convince the Administrator that the order is not reasonable.

Mr. Bailey said (R. 786):

> An oyster, being heavier than the brine, naturally settles; but with our 7¼ to 8 oz. fill in weight, our oysters protrude above the top of the can to the extent that *quite a high proportion of the cans have a portion of the oyster cut off* as it goes through the closing machine. In other words they are so full, they will have a gill possibly hanging over the edge of the can. (Emphasis added.)

The purpose of that testimony was to lead the Administrator to believe that the 6½ ounce fill just could not be met—that with the 5 ounce fill the cans are filled to capacity.

But after Mr. Steele introduced Exhibit 37, the witness said (R. 1159):

Q. Mr. Bailey, have you observed clipping of the type indicated by Ex. 37, using the 5 oz. fill?

A. Yes sir. You get a clipped mantle every once in a while.

Q. Do you grade those noted to be clipped as substandard and sell it as junked oysters?

A. It is too late. It is already sealed and it is on its way; there is not anything you can do about it.

Q. You sell without differentiation of the quality?

A. You have to do that, it is in the can sealed, and on its way, *and it is very rare* I will say, that *with a 5 oz. fill that occurs.* (Emphasis added.)

The finding made by the Administrator has ample support, including testimony that experimental packs which yielded 7 ounces of oysters were made in Willapoint's plant on June 16 without difficulty (R. 869, 1120) and none were clipped or injured (R. 870).

Section 701(f)(1) of the Act provides that "The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive." Under such provision, common in many statutes, such as § 10 (e) of the National Labor Relations Act, 29 U. S. C. 160 (e), the review court is not burdened with the task of considering, and it is not its function to consider the weight of the evidence to ascertain whether it preponderates in favor of the findings. As this court said in *National Labor Relations Board* v. *Reeves Rubber Company,* 153 F. (2d) 340, 342:

> "It would serve no purpose to collate the unbroken line of expressions by the Supreme Court of the United States and every one of the United States Circuit Courts of Appeals, including this circuit, that the Labor Board tries the facts and the reviewing court goes into facts only to find whether or not, as a matter of law, there is substance to the evidence upon which the Board has made its findings."

Much of the evidence in this case consists of controlled numerical count. The results speak for themselves. The remaining testimony relates to the opinions and conclusions of the witnesses as to the appearance of the oysters.

The witnesses from the Food and Drug Administration, shown to have had years of experience in problems of the nature involved in this case, testified that upon organoleptic examination of the oysters from different fills and prepared from different methods, no substantial difference in the appearance of the oysters was shown and that there was no substantial impairment of the quality of the product by reason of the increased fill. This evidence is competent, relevant and sufficient, if believed, to support the Administrator's order. The opinions of these men cannot be characterized as improbable, beyond belief, or inconsistent. Because the opinions of these experienced men and their conclusions may conflict with the opinions of the canners, does not warrant this court in substituting its judgment for that of the Administrator.

B.

The Standards Fixed are Reasonable and are Within the Scope of the Authority of the Administrator.

The test of reasonableness must be applied in the light of the provisions of the Act and its purpose. *Federal Security Administrator* v. *Quaker Oats Co.,* 318 U. S. 218. Section 401 of the Act (21 U. S. C. 341) places the duty upon the Administrator to fix a reasonable definition and standard of identity for food under its common or usual name as far as practicable and to fix a reasonable standard of fill of container, whenever in the judgment of the Administrator such action will promote honesty and fair dealing in the interest of consumers. It needs no argument to establish that the purpose of the provision in the law in relation to the standard of fill of container is to protect the consumer against a slack filled container. It is axiomatic to say that a reasonably filled container will promote honesty and fair dealing in the interest of the consumer and that a slack filled container will not. All of the evidence supports the conclusion that a No. 1 E.O. can containing 5 ounces is slack filled because it is approximately half filled with oysters. The petitioner

has sought to meet this situation by attempting to show that the liquid in its can is wholesome and has food value; therefore it should be permitted to market a canned product under the name of Pacific Oysters which is half liquid and half oyster and the 5-ounce fill should not be disturbed. The Administrator determined, in effect, that a standard of fill for canned oysters should contain as much oyster meat as could reasonably be placed in its can, irrespective of the method used in preparing the oysters for canning. In testing the validity of this conclusion the issue cannot be whether the petitioner's product, including the liquid, is a good wholesome product but must be limited to the inquiry whether the particular conclusion which the Administrator reached, to achieve the object and purpose of the statute, is one which a rational person could have chosen.

Consequently, the conclusion of the Administrator should not be disturbed unless it can be said that such conclusion is so unrelated to the authority delegated as to result in an irrational and arbitrary exercise of the delegated power. *Federal Security Administrator* v. *Quaker Oats Co., supra.* In that case, the Court, in considering the review provisions of the Act, said:

> The review provisions were patterned after those which Congress has provided for the review of "quasi-judicial" orders of the Federal Trade Commission and other agencies, which we have many times had occasion to construe. Under such provisions we have repeatedly emphasized the scope that must be allowed to the discretion and informed judgment of an expert administrative body. * * * These considerations are especially appropriate where the review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged. * * * Section 401 calls for the exercise of the "judgment of the Administrator." That judgment, if based on substantial evidence of record, and if within statutory and constitutional limitations, is controlling, even though the reviewing court might

on the same record have arrived at a different conclusion.

* * * * *

Since the definition of identity of a vitamin-treated food, marketed under its common or usual name, involves the inclusion of some vitamin ingredients and the exclusion of others, the Administrator necessarily has a large range of choice in determining what may be included and what excluded. It is not necessarily a valid objection to his choice that another could reasonably have been made. The judicial is not to be substituted for the legislative judgment. It is enough that the Administrator has acted within the statutory bounds of his authority, and that his choice among possible alternative standards adapted to the statutory end is one which a rational person could have made * * *.

See also *Gray* v. *Powell,* 314 U. S. 402; *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111; *Shields* v. *Utah Idaho Railroad Co.,* 305 U. S. 177; *South Chicago Coal and Dock Co.* v. *Bassett,* 309 U. S. 251; *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125.

Generally, it is held that the conclusion of the administrative official will be overthrown only if it is so wanting in logic that judges can say it lacks all cogency, *Perkins* v. *Endicott Johnson Corporation,* 128 F. (2d) 208, 222 (CCA 2), aff'd 317 U. S. 501; that it is not the proper function of the court to say whether it would have made the same findings, or whether on the basis of such findings it would have deemed it wise to make the order entered by the Administrator (*Sperry Gyroscope Co.* v. *National Labor Relations Board,* 129 F. (2d) 922 (CCA 2)); that if the record contains substantial evidence in support of the administrative findings, the findings are conclusive on the court even if the record also contains substantial evidence which would have supported an inconsistent finding. (*National Labor Relations Board* v. *Nevada Consolidated Copper Corp.,* 316 U. S. 105); and that the weighing of facts against the background of what is necessary for protection is within the exclusive province of the

administrator provided there is a rational basis (*Hartford Gas Co.* v. *Security & Exchange Commission,* 129 F. (2d) 794-96 (CCA 2)).[16]

We have shown that the findings of the Administrator are supported by substantial evidence. He was under the duty to fix standards which would promote honesty and fair dealing in the interest of consumers. The conclusion of the decisions cited is that where the findings are supported by substantial evidence, the conclusion of the administrative tribunal in adopting the facts to the statutory end must be sustained when there is found to be a rational basis therefor. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146; *Shields* v. *Utah Idaho Railroad Co.,* 305 U. S. 177; *Federal Security Administrator* v. *Quaker Oats Company,* 318 U. S. 218. We submit that the test has been met, and that the choice of the Administrator is valid. The standards being otherwise reasonable and within the statutory authority, it would be immaterial even if petitioner were required thereby to change his methods or his product or even if his product was driven from the market. Cf. *Mugler* v. *Kansas,* 123 U. S. 623; 628-633; *Powell* v. *Pennsylvania,* 127 U. S. 678, 683-684; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 302-303; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 151.

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[16] In reviewing discretionary action of administrative agencies, "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 145-146. See also *Power Commission* v. *Pipeline Company,* 315 U. S. 575, 586. The question is not whether some better regulation might have been devised but whether the particular regulation is arbitrary, capricious or palpably wrong. *Railroad Commission* v. *Rowan and Nichols Oil Co.,* 311 U. S. 614, 615; *Public Service Commissioners* v. *Havemeyer,* 296 U. S. 506, 518; *Pacific States Box Co.* v. *White,* 296 U. S. 176, 185-186. The courts will not substitute their own judgment for that of the administrative agency on the wisdom or expediency of a determination within its jurisdiction. *National Labor Relations Board* v. *Link Belt Company,* 311 U. S. 584, 596-597; *Gray* v. *Powell,* 314 U. S. 402, 412; *Swayne & Hoyt* v. *United States,* 300 U. S. 297, 304.

C.

The Orders Were Made in Careful Observance of Procedural Safeguards Provided by Law.

The third major contention made by petitioner is that the administrative process was infected by procedural errors which invalidate the orders. The points most strenuously argued are (1) that neither respondent "conscientiously read or considered all of the evidence"; (2) that a witness for the Food and Drug Administration and its counsel either wrote or had a hand in preparing the order of March 10; and (3) that erroneous rulings upon evidence were made by the hearing examiner.

Subsidiary contentions are (1) that the notice of hearing was inadequate; (2) that the conduct of the proceedings was not fair; and (3) that the hearing examiner put an unlawful burden of proof upon petitioner at the hearing held after remand by the Court.

1. Respondents Conscientiously Considered the Evidence of Record, and Recitations to That Effect in the Orders are Not Overcome by Inferential Arguments.

The order of March 10 was made by respondent Ewing. The order recites that it was made "on the basis of the evidence received at the above entitled hearing duly held pursuant to notice." Two of the conclusions recite that they were made "on the basis of the evidence of record and the foregoing findings of fact and conclusions". Each finding was followed by references to the testimony and exhibits, and the order explained:

> "The citations following each finding of fact refer to the pages of the transcript of the testimony and the exhibits received in evidence at the hearing, which are the basis for these findings."

In addition, respondent Ewing wrote to Mr. Steele, Mr. Mitchell, and Mr. Stephan, each of whom represented petitioner at the time, at different stages in the proceeding advising them that he had personally read the record and considered the issues. To Grosscup, Ambler and Stephan, Esqs., on May 25, 1948, Mr. Ewing wrote:

> "After personally studying the record of hearing, I am convinced that the findings of fact and the standards provided in the final order are based upon good and substantial evidence, and that the conduct of the hearing and the rulings made by the presiding officer were fair and correct."

The record shows very clearly that Mr. Ewing personally studied the record, and the order of March 10 changed the terms of the tentative order to reflect the issues completely. The court will notice that findings 6, 7, and 8 under standard of fill in the March 10 order differ from the tentative order. The record shows that rulings were made on all of the exceptions filed, and shows that the Administrator personally considered the petition filed on behalf of Willapoint Oysters, Inc., by Mr. Hugh B. Mitchell, its counsel. Mr. Mitchell personally discussed his petition with the Administrator before it was denied, and Mr. Ewing was well informed on the issues before him. It is an exaggeration and an untruth to assert that he failed to consider the evidence presented on petitioner's behalf.

The petitioner does not seriously contend that Mr. Ewing failed in this respect, but nevertheless asserts (Br. 77) that "neither of the respondents conscientiously read and considered all of the evidence."

It is, of course, settled law that affirmative recitations in the orders which show official regularity can hardly be overcome by mere implicational arguments or by allegations made without a basis in fact. *National Labor Relations Board* v. *Biles Coleman Lumber Co.*, 98 F. (2d) 16 (C. C. A. 9); *Twin City Milk Producers Ass'n* v. *McNutt*, 122 F. (2d) 564, 569 (C. C. A. 8).

The real heart of the contention is that the supplemental order was made by the Acting Administrator Kingsley, and that there is no recitation that he read and considered not only the evidence taken on the remand but also all of the evidence that had been carefully studied by his superior, Administrator Ewing (Br. 45-46, 76-78). The argument is that the recitation in the order of August 3,

that the said supplemental order was made "on the basis of evidence of record", is incorrect and cannot stand (Br. 62).

The facts shown by the record are that respondent Kingsley based his supplemental order on the evidence taken at the hearing on the remand, and so certified; and that he referred to the earlier record where necessary to make comparisons in his findings of fact. The findings made by Mr. Kingsley did not change any finding that previously had been made—they were supplemental findings which were consistent with the findings already made by Mr. Ewing.

It is important to remember that the proceedings on the remand were to be conducted within the statutory bounds of Section 701(f)(2), 21 U. S. C. 371(f)(2). The statute provides:

> If the petitioner applies to the court for leave to adduce additional evidence . . . the court may order *such additional evidence* (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings . . . or make new findings, *by reason of the additional evidence so taken* . . . (Emphasis added).

The Court's order was that the proceeding be remanded to the Administrator

> "with direction to take such additional evidence (and evidence in rebuttal thereof) as may be offered relative to said process of packing blanched oysters, within a period of 30 days from the date of this Order on such reasonable notice to the petitioner as he may give."
>
> It is Further Ordered that the Administrator, *after considering said evidence,* may modify his findings as to the facts, or make new findings by reason of the additional evidence so taken . . . (Emphasis added).

It seems entirely clear from the statute and the Court's order that the Administrator was not required to re-hear the entire case on the remand. Evidence was to be taken and findings made upon a narrow issue, i.e., as to the alleged new method of preparing oysters for canning and as to the relationship of such method to a reasonable standard of fill of container for canned oysters.

Petitioner asserts that, because of the absence of Administrator Ewing, the Acting Administrator could reach a decision on the additional evidence only after having studied the evidence that was the basis for the original order. In this, it relies entirely upon the first Morgan case. *Morgan* v. *United States*, 298 U. S. 468 (1936).

It should be noted that both the first *Morgan* case and the second *Morgan* case, 304 U. S. 1, are based upon a failure to observe procedural due process in a quasi-judicial proceeding. Therefore, the decision is of no applicability in administrative rule-making. *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176. Even so, it cannot be said, upon a fair reading of the *Morgan* decisions, that the Acting Administrator was required personally to review the matters that had been decided by Mr. Ewing before he could find the facts that were shown by the additional evidence.

The *Morgan* cases, and the decisions that have followed them, hold that the head of an administrative agency may utilize the work of assistants in sifting and analyzing the evidence. There is no requirement that he personally read the transcript of the evidence and digest the exhibits.

In the first *Morgan* case, 298 U. S. 468, 481-482, the Court stated that the duty of making the order "cannot be performed by one who has not considered evidence or argument". Further, the Court said: ". . . the officer who makes the determination must consider and appraise the evidence which justifies them". But it explained what it meant by "consider" by stating:

> This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute in-

> quiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates.

This necessarily means that the rule maker may utilize the analyzed and sifted report of the evidence instead of reading the record personally.

There are many decisions of inferior Federal courts in accord. In *Cupples Co.* v. *National Labor Relations Board,* 103 F. (2d) 953 (C. C. A. 8) the court said (p. 958):

> The court (in Morgan Case #1) did *not* hold that the officer making the decision must necessarily read all the evidence. It conceded that the officer could rely upon analysis and summary of the evidence by competent subordinates. He must consider and appraise the evidence, but such consideration and appraisal may be based on the work of subordinates.
> In the second Morgan case, the court held that it was not necessary to discuss the extent to which the Secretary examined the evidence and it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusion.

See also *Inland Steel Co.* v. *National Labor Relations Board,* 105 F. (2d) 246 (C. C. A. 7); *National Labor Relations Board* v. *Baldwin Locomotive Works,* 128 F. (2d) 39 (C. C. A. 3); *National Labor Relations Board* v. *Lane Cotton Mills,* 108 F. (2d) 568 (C. C. A. 5); *Norris & Hirshberg* v. *Securities and Exchange Commission,* 163 F. (2d) 689 (App. D. C.).

In the case at bar, the record shows that Mr. Kingsley read and was thoroughly familiar with the March 10 order promulgated by Mr. Ewing. The record shows that Mr. Kingsley did in fact refer to pertinent portions of the record of the first hearing. It shows that he did read the findings and conclusions of Mr. Ewing. Since Mr. Kingsley is permitted by all authorities to utilize the assistance of subordinates in sifting the evidence, had he done so there would be no question of compliance with the procedural requirements of the *Morgan* case. It certainly cannot be said that the analysis which Mr. Ewing

personally made and which culminated in the order of March 10 is less acceptable. The requirements of the *Morgan* case are not technical, and there was substantial compliance in this proceeding. The implicational argument advanced by the petitioner is not sufficient to overcome the presumption and evidence of official regularity. *Twin City Milk Producers Ass'n* v. *McNutt,* supra.

The *Donnelly Garment Co.* case (123 F. (2d) 215), cited by petitioner (Br. 80), does not hold that a presumption of regularity is overcome by mere allegation. Clear and convincing proof must be offered to rebut the presumption, and the only evidence in this case sustains it. The *Powhatan Mining Co.* case (118 F. (2d) 105), also cited, was an instance in which the record showed a denial of full cross-examination. That was held to be error, but no such point is present here. The case does not mean that a mere unsupported assertion is enough to show illegality.

A holding that Mr. Kingsley was required to re-evaluate the evidence that had been the basis of the March 10 order would have made it impossible to comply with the Court's directive that a prompt report be made on the evidence taken on the remand. Carried to its logical conclusion, it would effectively stop the administrative process by making all changes in existing regulations conditional upon a re-evaluation of the evidentiary basis on which action initially was taken. It could as well be argued that the March 10 order was void because Mr. Ewing did not recite that he had read and considered the evidence taken in the 1944 hearing held while Mr. McNutt was administrator.

We respectfully submit that error has not been shown in Mr. Kingsley's consideration of the additional evidence.

The decision in the second *Morgan* case finally turned on the absence of adequate notice of the Secretary's position for initiating the hearing, and the absence of any intermediate or tentative findings (304 U. S. 18-21). In the present case, however, pursuant to section 701(e) of the Federal Food, Drug, and Cosmetic Act, notice of hearing was published in the Federal Register containing a

detailed statement of the proposed regulations. After the hearing in July, 1947, a tentative order was issued on October 10, 1947. Petitioner objected and filed exceptions through its counsel. A final order was issued on March 10. Thus, the procedural steps that were observed take the case outside the rule established in the second *Morgan* case. Clearly, the Supreme Court there did not require that the head of an administrative establishment personally read each and every part of the record.

2. There Was No Error in the Hearing Examiner's Refusal to Permit Inquiry as to Whether a Food and Drug Administration Witness or its Counsel Prepared Parts of the March 10 Order or Whether the Administrator Consulted With Them.

The petitioner specifies as erroneous the rulings of the hearing examiner which precluded inquiry of the witness Callaway as to whether he wrote or had some hand in preparing the order of March 10 (Br. 47, Spec. (3)(b)(c) and (d)). Objection on the ground that the document imported regularity was sustained, and the examiner ruled that the inquiry was beyond the scope of the hearing (R. 960). Thereafter, petitioner's counsel made an "offer of proof" (R. 993) intended to show that Section 5(c) of the Administrative Procedure Act had been violated. The hearing examiner ruled that the section was inapplicable.

It readily will be seen from the colloquy between counsel for petitioner and the hearing examiner that petitioner was not prejudiced by the interruption of its so-called offer of proof. This is what occurred (R. 993-4):

> Mr. Stephan: I offer to prove by these questions presently addressed to Mr. Callaway and likewise questions yesterday that, in violation of my understanding of the Administrative Procedure Act, Section 5(c), the order in issue of March 10, 1948, violates so much of that section as provides that "save to the extent required for the disposition of ex-parte matters as authorized by law, no such officer (referring to the officers who presided at the hearings) shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate, nor shall such officer——"

> PRESIDING OFFICER GODING: I hesitate to do this, but I think I am constrained to break in on you. I think what you are reading is entirely irrelevant to these proceedings, because what you are referring to, sir, relates exclusively to quasi-judicial matters; this is a rule making hearing and it is quasi-legislative, and I do not think you are gaining anything by any extended discussion of Section 5 or any part of it.
>
> MR. STEPHAN: I will then accede to the Examiner's statement and preserve an exception as to whether or not the function presently before us falls within the classification indicated.
>
> PRESIDING OFFICER GODING: Very well. Shall we get on now with interrogation?

Petitioner's position was sufficiently made clear by the quoted statement, and no prejudice ensued from the presiding officer's interpolation. Petitioner's contention that it was unfairly prevented from completing an offer of proof (Br. 80-81) is manifestly untenable. Any further discussion of the legal proposition involved would have needlessly cluttered the record.

(a) *Section 5(c) of the Administrative Procedure Act is inapplicable to the rule-making proceeding involved in this case.*

Petitioner seeks to apply the rule of separation of functions of administrative officials which applies in quasi-judicial or adversary proceedings to quasi-legislative or rule-making proceedings.

At the outset it should be noted that petitioner does not seriously contend that the administrative process under attack involved anything other than rule-making. Petitioner (Br. 81-82) quotes from *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U. S. 218, 228, wherein the court, in passing on another food standard issued under sections 401 and 701 of the Federal Food, Drug, and Cosmetic Act, stated that the "review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of

a statute with whose enforcement it is charged." Petitioner (Br. 83) also refers to the Final Report of the Attorney General's Committee (1941), Doc. 8, 77th Cong. 1st Sess., pp. 108-110, and quotes therefrom that "Hearings in rule-making are usually . . . investigatory . . . The purpose is not to try a case."

The standards under consideration in this case affect not only the petitioner but also all other oyster canners throughout the United Sates. There is no basis for a contention that this was a proceeding on issues between petitioner and the Agency.

It (Br. 81-90) contends, however, that Sec. 5(c) of the Administrative Procedure Act and judicial procedural due process precludes Mr. Callaway and counsel for the Food and Drug Administration from participating or advising in the promulgation of regulations involved here once the record was closed.

Sec. 5(c) prohibits officers or employees of the Agency from participating or advising in the decision of any case in which they were engaged in the performance of investigative or prosecuting functions for the Agency. The specific language of the Act makes it entirely clear that this provision is not applicable to rule making procedures. Section 5 applies and is limited to "adjudications". "Order and adjudication" is defined in Section 2 as follows:

> (d) Order and Adjudication. — "Order means the whole, or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter *other than rule making* but including licensing. "Adjudication" means agency process for the formulation of an order. (Italics supplied.)

As stated in Sen. Doc. 248, 79th Cong., 2d Sess., p. 24: "Section 5(c) is confined to adjudication (other than licensing) and does not apply to rule making." Since the prohibitions referred to are in section 5(c) and section 5 deals solely with adjudications, the regulation making procedure under the Federal Food, Drug, and Cosmetic Act is not affected thereby.

In support of its contention, petitioner quotes from a Senate Committee Report. (Br. 84.) This quotation is distorted, however, as the result of significant deletions and is therefore highly misleading. The point sought to be made by petitioner in this incomplete quotation is that rule making is exempted from section 5(c), except in cases of rule making which generally involve sharply controverted factual issues.

The first answer to this is that in the framework of the Administrative Procedure Act rule making is not *exempted* from the provisions of section 5(c); it is not controlled by section 5(c) at all. Furthermore, the legislative history of the Administrative Procedure Act, including the excerpts from S. Rep. No. 752 which petitioner distorts, manifests a congressional desire to fix separate requirements for rule making and adjudication procedures. An accurate quotation of the excerpt upon which Petitioner relies, S. Rep. No. 752, 79th Cong. 1st Sess. (Administrative Procedure Act, Legislative History, 79th Cong. 2nd Sess., S. Document No. 248, pp. 203-4) is as follows:

> The gist of the subsection is that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings, and even then in no different fashion than the private parties or their representatives. "Ex parte matters authorized by law" means passing on requests for adjournments, continuances, filing of papers, and so forth. The exemption of applications for initial licenses frees from the requirements of the subsection such matters as the granting of certificates of convenience and necessity which are of indefinite duration, upon the theory that in most licensing cases the original application may be much like rule making. *The latter, of course, is not subject to any provision of section 5.* The exemption of cases involving "the past reasonableness of rates" (if triable *de novo* on judicial review they would be exempted in any event) is made for the same reason. There are, however, some instances of either kind of case which tend to be accusatory in form and involve sharply controverted factual issues. Agencies should not apply the exceptions to

> such cases, because they are not to be interpreted as precluding fair procedure where it is required. (Italics supplied.)

The meaning of this paragraph from S. Rep. No. 752 is clear enough without extended comment. Manifestly, in using the word "exemption" the Committee referred to the first two of the three exceptions listed, i. e., applications for initial licenses and proceedings involving the reasonableness of rates. Because of their similarity to rule making, generally, these two classes of proceedings were to be excepted from the provisions of Section 5(c). As the Committee stated, however, the exemption should not be applied in any specific case *under these two classes of proceedings* "which tend to be accusatory in form and involve sharply controverted factual issues."

This is entirely different from saying that all rule making proceedings which happen to involve instances of sharply controverted factual issues are subject to Section 5(c). The substance of what was done by the orders under review was clearly legislative and in no sense adjudicatory.

In its "General Comments" this same Senate Committee (Administrative Procedure Act, Legislative History, S. Doc. 248, p. 216) comprehensively summed up its attitude, expressly referring to its specific comment which is above quoted. The Committee elsewhere recognized that: "The bill provides quite different procedures for the 'legislative' and 'judicial' functions of administrative agencies." (S. Doc. 248, supra, p. 193).

There is, we suggest, nothing in the context of the Administrative Procedure Act nor in its legislative history which requires the abandonment of the historical practice of an administrative agency of utilizing its specialized personnel in the formulation of regulations of general applicability.

(b) *Judicial due process can not properly be invoked in the administrative rule making proceedings involved here.*

The 5th Amendment of the Constitution provides that:

> No person shall be . . . deprived of life, liberty or property without due process of law.

We do not, of course, contend that this Constitutional inhibition is not applicable to legislative as well as judicial action. We do contend, however, that the "constitutional 'rudiments' of fair play" (Br. 85) in judicial proceedings should not properly be carried over and applied in quasi-legislative matters such as are involved here.

At the outset, we believe it is essential to note the distinction between administrative rule-making and administrative adjudication, which petitioner's argument and citation of cases tend to obscure (Br. 85-90). The following is an effective statement of the general distinction:

> The most obvious definition of rule-making and the one most often employed in the literature of administrative law asserts simply that it is the function of laying down general regulations as distinguished from orders that apply to named persons or to specific situations. Most acts of legislatures, although by no means all, establish rights and duties with respect either to people generally or to classes of people or situations that are defined but not enumerated. Conversely, the judgments of courts usually are addressed to particular individuals or to situations that are definitely specified. Similarly, administrative action can be classified into general regulations, including determinations whose effect is to bring general regulations into operation, and orders or acts of specific application.[18]

It has long been recognized that the procedural requirements imposed in any given rule making activity are to be found in the statute which vests authority to issue the regulations. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 303-312. In that case the Court applied the rule that under the Tariff Act of 1922 (42 Stat. 858, 941)

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[18] Fuchs, *Procedure in Administrative Rule-Making,* 52 Harv. L. Rev. 259, 263.

an opportunity "to produce evidence, and to be heard" did not confer a right of unlimited examination and cross-examination of witnesses, comparable to the rights of a litigant in a judicial trial. Said the Court (288 U. S. 308):

> Nothing in the statute suggests a belief of the lawmakers that every producer or importer is to be viewed, like a party to a lawsuit, as the adversary of every other, with the privilege of examination and cross-examination extended through the series.

It has been held that the 14th amendment of the Constitution *does not even require a hearing* to persons affected by general regulations or legislation. See *Bi-Mettalic Investment Co.* v. *State Board, etc.,* 239 U. S. 441. Under attack in that case was an order of an equalization board which petitioner claimed diminished the value of its property without due process of law. Said the court, through Mr. Justice Holmes, at p. 445:

> The Constitution does not require all public acts to be done in town meeting or an assembly of the whole.

The same proposition was restated more recently in *Bowles, etc.* v. *Willingham et al.,* 321 U. S. 503. In that case the issuance of certain orders of the Administrator of Price Administration fixing maximum rents was sought to be restrained because no hearing was provided for by the statute (Emergency Price Control Act of 1942, 50 U. S. C. App. Supp. II, Sec. 901). The court pointedly stated (p. 519):

> Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, . . . Congress need not make that requirement when it delegates the task to an administrative agency.

Even where notice and public hearing have been given, there is no constitutional requirement that an administrative agency make special findings of fact as part of its rule making process. This was the holding in *Pacific States Box & Basket Co.* v. *White et al.,* 296 U. S. 176, which involved an order of a State administrative agency establishing standards of capacity and form for fruit and vege-

table containers. The Court disposed of the contention of such a requirement in the following language (p. 186):

> It is contended that the order is void because the administrative body made no special findings of fact. *But the statute did not require* special findings; doubtless because the regulation authorized was general legislation, not an administrative order in the nature of a judgment directed against an individual concern. (Italics added.)

It is clear from the foregoing that the procedural obligations imposed on an administrative agency in its rule making activities are not to be found in the Constitution, but rather in the statute which authorizes it to act. Cf. *Opp Cotton Mills etc.* v. *Administrator,* 312 U. S. 126, 152-153.

This is not to say that Congress can not impose additional procedural requirements, by general statute or otherwise, on the rule making activities of Federal agencies. Indeed, it has done this, in many regards, in the Administrative Procedure Act (5 U. S. C. 1001 et seq.) Preliminary to the passage of this law Congress and a host of legal specialists in the field of administrative law struggled with the task of prescribing an intelligent code of fair administrative procedure in all agency activities. In all of the reports, debates and comments and, most important, in the scheme and context of the law itself, the distinction between administrative rule making and adjudication was made clear. The historical development of the distinction between these two classes of proceedings was recognized and restated. Thus, "The Administrative Procedure Act is based upon a broad and logical dichotomy between rule making and adjudication, i. e., between the legislative and judicial functions." Attorney General's Manual on the Administrative Procedure Act (1947) p. 50. In the framework of the Act separate sections deal exclusively with rule making and adjudication: section 4 is concerned with rule making, section 5 with adjudications, and sections 7 and 8 fix the rules governing hearings and decisions in both classes of proceedings.

We have already pointed out above that the prohibitions in section 5(c) against investigative personnel participating in the decision is not applicable to rule making proceedings. This further point should be reemphasized: the zealous manner by which Congress sought to limit this prohibition to adjudications is pointed up by its exclusion of two categories of proceedings which formally might be classed as quasi-judicial but in fact usually have the attributes of rule making. These are proceedings involving initial licenses and rates, facilities or practices of public utilities or carriers.

Congress recognized the need for permitting agency heads to continue, in the formulation of regulations, the practice of utilizing the expert and technical knowledge of agency personnel. This proposition was succinctly stated in the Attorney General's Manual on the Administrative Procedure Act, p. 15:

> Even in formal rule making proceedings subject to sections 7 and 8, the Act leaves the hearing officer entirely free to consult with any other member of the agency's staff. In fact, the intermediate decision may be made by the agency itself or by a responsible officer other than the hearing officer. This reflects the fact that the purpose of the rule making proceeding is to determine policy. Policy is not made in Federal agencies by individual hearing examiners; rather it is formulated by the agency heads *relying heavily upon the expert staffs which have been hired for that purpose.* (Italics added.)

We believe that the foregoing abundantly demonstrates the fallacy of petitioner's claim of prejudicial denial of procedural due process. It contends in effect that it was prevented from showing that officials of the Food and Drug Administration, who were involved in the hearing, actively participated in the drafting of the regulations now under attack. It is established that the Administrator's regulations fixing standards of identity and fill of container for canned oysters under Sections 401 and 701(e) of the Federal Food, Drug, and Cosmetic Act constitute rule making, and not adjudication. The Supreme Court expressly stated

in the *Quaker Oats Co.* case, 318 U. S. 218, 228, that standards such as these are " . . . regulations of general application adopted by an administrative agency under its rule-making power . . . "

The cases cited by petitioner (Br. 85-90) all involved judicial or quasi-judicial proceedings. This includes *Morgan* v. *United States* 304 U. S. 1, upon which petitioner places great reliance. For the reasons stated, such cases are inapplicable to the case before this Court.

Even under the principle of the *Morgan* cases, it would have done petitioner no good to show that certain officials participated in drafting the regulations. Had this been shown, it does not follow that the Administrator did not consider all of the evidence adduced at the hearing and exercise his independent judgment before signing the order of March 10.

In the second *Morgan case,* 304 U. S. 1, the Secretary of Agriculture testified in answer to the question whether the order represented his independent conclusion as follows (304 U. S. 18):

> My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry.

The court thereupon made this statement (304 U. S. 18):

> In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport.

This alone reveals that the line of interrogation propounded by the petitioner and the offer of proof do not demonstrate prejudicial error. He was not entitled by interrogation of a witness who appeared at the hearing to probe the mental processes of Mr. Ewing in reaching a determination.

3. No Error Was Made in the Admission and Reliance Upon Certain Hearsay Evidence.

It is argued that "the orders should be set aside as based upon 'mere uncorroborated hearsay or rumor' ". (Br. 96.) Complaint is made both as to the admission of evidence of that character and the subsequent reliance upon it in the findings and conclusions (Br. 92).

The evidence to which this argument is directed was (1) reports by inspectors of the Food and Drug Administration designed to reveal dealer and consumer understanding as to any differences in canned oysters, as to any differences in fill of container for the food, and as to whether canned oysters from the South Atlantic and Gulf areas were being sold in competition with canned Pacific oysters (Ex. 4, 5, 6, and 7; Spec. 12; Br. 57, 92-96); (2) testimony of Inspector Hansen that he displayed commercially packed oysters and experimentally packed oysters to large scale buyers for quality comparison and recorded their comments (R. 878-882; Spec. 5(g), 38; Br. 52, 64); (3) testimony of Inspector Hansen that a woman packer told him during the experimental pack that she had no difficulty in making the higher fills (R. 866, Ex. 42; Spec. 5(f); Br. 51); and (4) testimony of Inspector Hansen as to opinion in the oyster canning business as to the new blanching method of preparing oysters for canning (R. 847; Spec. 5(i); Br. 52).

It is highly questionable whether a government survey made and reported by inspectors of the Food and Drug Administration in the performance of their official duties can be classified as "mere uncorroborated hearsay or rumor" as that language is used in the *Consolidated Edison* decision (305 U. S. 197). This was a fact finding proceeding preliminary to administrative rule-making. It was

essential to ascertain wholesale and retail merchandising practices and consumer understanding as to the fill of container. It was not practicable, especially in the absence of subpoena power, to call all of the people necessary to establish the facts. To have called any significant group of them would unduly have extended the hearing. But the results of the survey gave the necessary evidence in reliable form. It was the type of evidence that Congressional committees customarily rely upon in reporting legislation. The Food and Drug Administration inspectors had no incentive to misrepresent the facts, and should be considered as having performed their work with regularity.

The exhibits which reported the surveys were admitted into evidence without objection from counsel. No request was made that they be "decoded" to facilitate cross-examination. Under the principle of *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 155,[19] this evidence was entitled to its natural probative effect. There the findings rested "to a substantial degree, upon studies of statistical data with respect to [economic and competitive conditions in the industry] gathered by government agencies and published by them officially." The principal attack was upon a bulletin prepared by the Bureau of Labor Statistics.

The Court said:

> . . . it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules be observed. [citing cases]. We need not consider whether this class of evidence must be excluded from proceedings in court.
>
> Further the documents in question were received in evidence without objection. And even in a court of law if evidence of this character is admitted without objection it is to be considered and must be accorded 'its natural probative effect as if it were in law admissible' . . .
>
> The reliability of the data published in the Bulletin was supported before the Administrator by the testimony of some of his compilers. In the circumstances

[19] See also *Spiller* v. *A. T. & S. F. Ry. Co.,* 253 U. S. 117, 130.

> we think the Bulletin . . . [was] evidence to be considered by the Administrator; that the weight to be given to them and the inferences to be drawn from them were for the Administrator and not the courts, and that they lend substantial support to his findings.

It might be added that the finding of competition between oysters from the Gulf area and Pacific oysters is corroborated by petitioner's Exhibit 28 which reveals that competing cans were brought in the open market at Portland, Oregon. It is also corroborated by Exhibit 34 and by testimony of a Pacific canner (R. 445).

There is much authority to sustain the admission of the hearsay evidence,[20] and we need not labor the point. The only serious question is whether the evidence is reliable and may be taken into account in reaching a decision.

The House Committee on the Judiciary, H. R. Rep. 1980, 79th Cong., 2d Sess., reported that Sec. 7(c) of the Administrative Procedure Act requires that accepted standards of probity, reliability, and substantiality of evidence be applied. It said, however, that:

> These requirements do not preclude the admission of or reliance upon technical reports, surveys, analyses, and summaries where appropriate to the subject matter.

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[20] Sec. 7(c), Administrative Procedure Act, 5 U. S. C. 1006(c); and see explanation in Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong. 2d Sess.; Attorney General's Manual on Administrative Procedure Act, pp. 75-78; Stephan, *Fact-Finding Boards and the Rules of Evidence*, 24 A. B. A. J. 630, 636. Mr. Stephan has written:

> "It is submitted that no arbitrary rule can be applied to each case, but the test should rather be the availability of other or better, evidence. In each case, some final administrative action must be taken. This frequently affects large groups other than the contestants at the commission's bar. In this respect, it differs from a private plaintiff or defendant winning or losing a suit for deficiencies in evidence, without any resulting prejudice to the public. In administrative proceedings, the same hearsay evidence in one case may be the poorest sort, and fail to meet the suggested criterion. It should accordingly be excluded. In another case, the same evidence may be the best available proof of the facts and it should be admitted, regardless of exclusionary rules. Its credibility and weight can be tested by cross-examination and rebuttal. Its admissibility should be determined by the reasonable availability of better evidence."

The survey evidence, therefore, is clearly substantial to establish the facts for which it was cited in Findings 5 of the March 10 order under both Identity and Fill of Container.

The testimony of Inspector Hansen as to the reaction of buyers upon quality comparison of commercially canned oysters and oysters packed to yield 6½ ounces was corroborated by the testimony of Mr. Callaway and other Food and Drug Administration witnesses who testified as to a similar comparison (R. 800, 824-825). Mr. Esveldt testified that he based his opinions on quality largely upon his experience in cutting cans with buyers (R. 325).

Mr. Hansen's testimony as to the comments of the woman packer to the effect that she had no difficulty in meeting the fills is corroborated by testimony as to his own experience in putting up packs in three different canneries (R. 861, 866, 869-871, 1120).

The testimony as to discussions with canners regarding the blanching method of preparing oysters for canning and as to the quality of the resultant pack is corroborated by Exhibits 23 and 24, which are affidavits from canners, and by the testimony of Food and Drug Administration witnesses.

Thus, under the principle of *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 230, the hearsay was corroborated and may be relied upon. In *Union Drawn Steel Co.* v. *National Labor Relations Board,* 109 F. (2d) 587, 592 (C. C. A. 3), the court held in an adjudicatory proceeding that a finding of fact could be sustained by testimony of an employee who had been on strike as to what a foreman told him when the employee sought reemployment. The only evidence in corroboration was the known hostility of the employee to the labor union and the fact that the employee's place had been filled by another man. Much more corroboration is present in the case before this Court.

We believe that the correct rule to be applied is that stated by Circuit Judge Learned Hand in *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862,

873 (C. C. A. 2), cert. denied 304 U. S. 576. Judge Hand stated that mere rumor will not serve to constitute substantial evidence in support of a finding

> . . . but hearsay may do so, if more is not conveniently available, and if in the end the finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs.

The common law rule as to the exclusion of hearsay evidence, designed as it is to prevent a jury of untrained laymen from relying on evidence of little probative value, does not preclude the administrative agency from accepting and relying on the evidence here involved. Inspector Hansen was present, and was subjected to thorough cross-examination. There was ample opportunity for rebuttal.

It would not have been reasonable to require the presence of the buyers from six Seattle wholesale groceries, the packers in three canneries, and the several persons operating canneries in the Pacific Northwest before it could be shown that the blanching method of preparing oysters for canning did not result in a product of higher quality and that such oysters could be packed to yield a 6½ ounce cut-out weight from the No. 1 EO can without quality impairment. Responsible persons would readily rely upon the report of a Food and Drug Administration inspector who displayed the oysters to buyers for comparison, who was present when the packers were filling the cans, and who canvassed the industry to determine the facts as to whether the quality of canned oysters suffered when they were prepared for canning by blanching and were packed to yield 6½ ounces of drained weight. His testimony was in no sense mere uncorroborated hearsay or rumor. It was strongly corroborated evidence of the best kind available. We submit that it sustains the findings for which it was cited and was properly relied upon by the Administrator.

4. The Administrator and the Hearing Examiner Did Not Abuse Their Discretion in Rulings as to Time and Place of the Hearing, Requests for Postponement and for Separation of Issues, Admission and Exclusion of Evidence, or in Imposing an Improper Burden of Proof Upon Petitioner.

The courts have uniformly held that the time [21] and place [22] of a hearing, postponements,[23] and separation and consolidation of hearings [24] are matters within the sound discretion of the administrative agency or the hearing examiner.

The regulations here under review affect canners of oysters on the Atlantic, Gulf and Pacific coasts. The hearings were held in Washington, D. C., and were participated in by persons from the Gulf area, the Pacific Northwest and the Food and Drug Administration. The Administrator concluded that the convenience of all concerned would best be served by hearings in Washington, D. C. In that, no abuse of discretion existed.

Notice of the first hearing—which petitioner claims was unduly short so as to deny adequate opportunity for preparation (Spec. 4, 56; Br. 48, 70)—was published in the Federal Register on June 6, 1947. The hearing began on July 10, 1947. This was in complete compliance with the Federal Food, Drug, and Cosmetic Act, Sec. 701(e), 21 U. S. C. 371(e). Cf. *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126, 153. In addition to the notice required by the statute, a statement of general policy or interpretation issued on February 7, 1947, a copy of which went to the petitioner, advised interested parties of the Administrator's intention to call a hearing on proposals to fix a standard of fill of container for canned oysters

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[21] *Peninsula Corp.* v. *United States,* 60 F. Supp. 174, 180 (D. C.).

[22] *National Labor Relations Board* v. *Southwestern Greyhound Lines, Inc.,* 126 F. (2d) 883, 887-888 (C. C. A. 8).

[23] *National Labor Relations Board* v. *Algoma Plywood & Veneer Co.,* 121 F. (2d) 602, 605 (C. C. A. 7); and *National Labor Relations Board* v. *American Potash and Chemical Co.,* 98 F. (2d) 488 (C. C. A. 9).

[24] *American Trucking Ass'n* v. *United States,* 326 U. S. 77, 83; and *American Power & Light Co.* v. *Securities and Exchange Commission,* 141 F. (2d) 606, 614 (C. C. A. 1).

(Exhibit 8). Experimental packs of canned oysters were made in petitioner's plant as early as the spring of 1946. Experimental packs also were made on petitioner's behalf in June, 1947, before the notice of hearing issued (Ex. 19). Petitioner had ample notice, and the hearing on the remand afforded an additional opportunity to present evidence.

As to the request for separate hearings on the standard of identity and the standard of fill of container (Spec. 4(c) and (d); Br. 49-50), the hearing examiner ruled that it was more practicable to hear both standards together (R. 11-13). It was essential that the food be defined before a standard of fill of container could be effectively applied to it. No effort is made by petitioner to show abuse of discretion, and there was none.

(b) *Rulings on the Evidence.* The preceding point discusses the admission of hearsay evidence, and reliance upon it. Supra, pp. 62-66. Petitioner also complains of refusal to strike certain testimony (Spec. 5(f), (b), and (j); Br. 51-53); of a ruling that a question was objectionable because argumentative (Spec. 5(k); Br. 53); and of refusal to receive in evidence a number of cans of oysters to the end that they might be opened and evaluated by the Court (Spec. 5(l); Br. 53).

The reason given for the motions to strike testimony was that there was "no substantiating testimony of any quantitative or measurable kind whereby petitioner can in any way appraise the statements and that no documentary evidence had thus far been offered to support such a statement." We know of no authority, and none has been cited, to sustain the motions to strike. The complaint goes to weight and not admissibility of the evidence.

It is to be remembered also that rulings on evidence rest within the discretion of the hearing examiner, and prejudice must be shown to warrant reversal because of such rulings. Sec. 10(e), Administrative Procedure Act, 5 U. S. C. § 1009(e); *Kishan Singh* v. *Carr,* 88 F. (2d) 672 (C. C. A. 9); *National Labor Relations Board* v. *Hearst,* 102 F. (2d) 658, 662-663 (C. C. A. 9); *National Labor Rela-*

tions Board v. *Burke Machine Tool Co.,* 133 F. (2d) 618 (C. C. A. 6); *National Labor Relations Board* v. *Condenser Corp.,* 128 F. (2d) 67 (C. C. A. 3). There was no denial of justice in overruling the motions to strike.

After the examiner had ruled that a question asked by petitioner's counsel was argumentative (Spec. 5(k); Br. 53), counsel was permitted to continue his interrogation by asking substantially the same question with the argumentative part deleted. No prejudice existed. There is no rule which requires a hearing examiner to stand idly by and permit a confused or misleading record to be made through the use of argument in questions. Cf. *Bethlehem Steel Co.* v. *National Labor Relations Board,* 120 F. (2d) 641, 652 (App. D. C.).

The offer of the cans of oysters was rejected (1) because the rules of practice [21 CFR Cum. Supp. 2.707(g)] forbid their receipt; and (2) because the offer was made for the purpose of presenting original evidence to the Court rather than to the Administrator. The suggestion that the cans might be opened and described for the record in comparison with cans of commercial production was rejected by petitioner's counsel (R. 1023-1030). There was no error in excluding the evidence.

In closing this point, we must point out that no evidence outside the record was resorted to by the Administrator. The hearing examiner ruled only that the work sheets were available in the Agency files *and could be placed in the record* by the Administrator if he wished to overrule the hearing examiner. This was *not done* and the work sheets were not considered except to the extent that they were developed in the cross-examination.

(c) *Burden of Proof.* Petitioner argues that the hearing examiner placed an improper burden of proof upon it in calling it the proponent of the rule (Spec. 5(m); Br. 54, 113-116). In this, it relies upon the Administrative Procedure Act, § 7(c), 5 U. S. C. 1006(c).

This proceeding turns in no way upon petitioner's failure to maintain a burden of proof. All that was required of petitioner was that, after the remand, it proceed to

adduce the evidence that it had described in its motion for the remand. That accorded with the court's order of remand.

Section 7(c) of the Administrative Procedure Act does not relieve a party of the burden of going forward in such circumstances. S. Rep. 752, 79th Cong., 1st Sess.; Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong. 2d Sess., p. 208, states:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case *but that other parties, who are proponents of some different result also for that purpose have a burden to maintain.* (Emphasis added.)

The Food and Drug Administration did not rest upon an inadequacy of petitioner's evidence. Instead, it presented evidence on its own behalf of much greater probative force than that presented by petitioner.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the orders under review have ample evidentiary support, were made in compliance with procedural safeguards provided by law, and should be in all respects affirmed.

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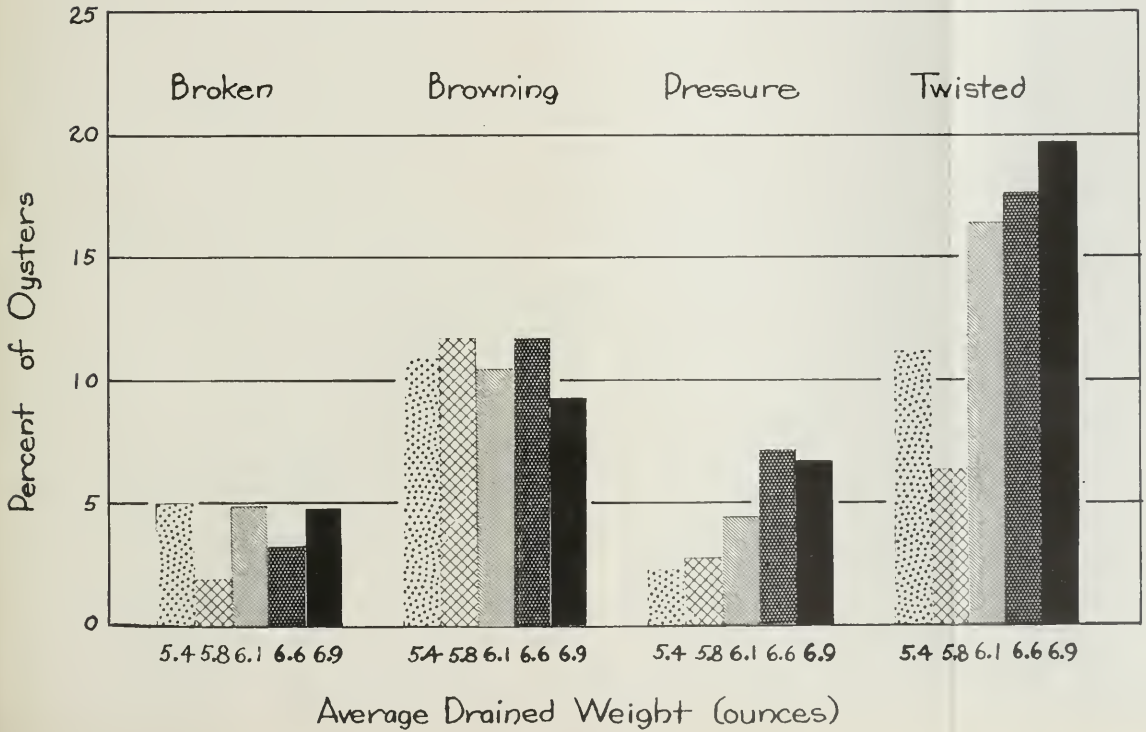
☆ U.S. GOVERNMENT PRINTING OFFICE 1948—815410/P.O. 264

EXPERIMENTAL PACK OF PACIFIC CANNED OYSTERS



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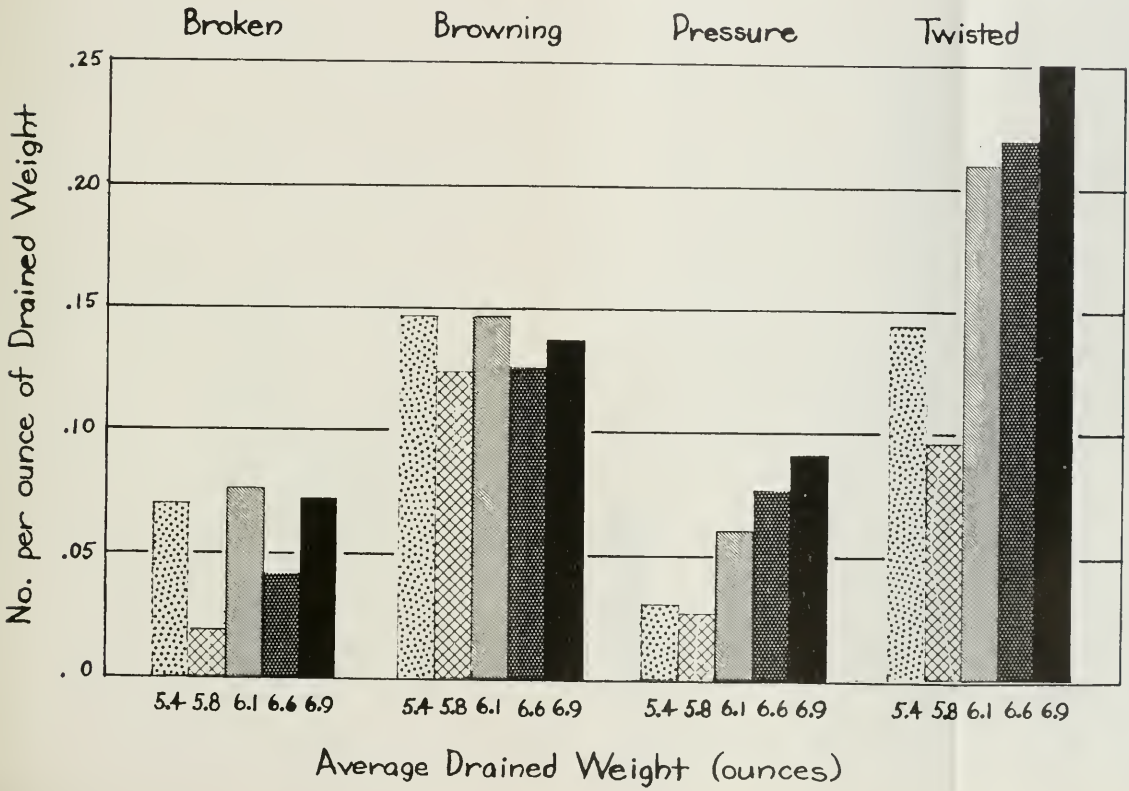
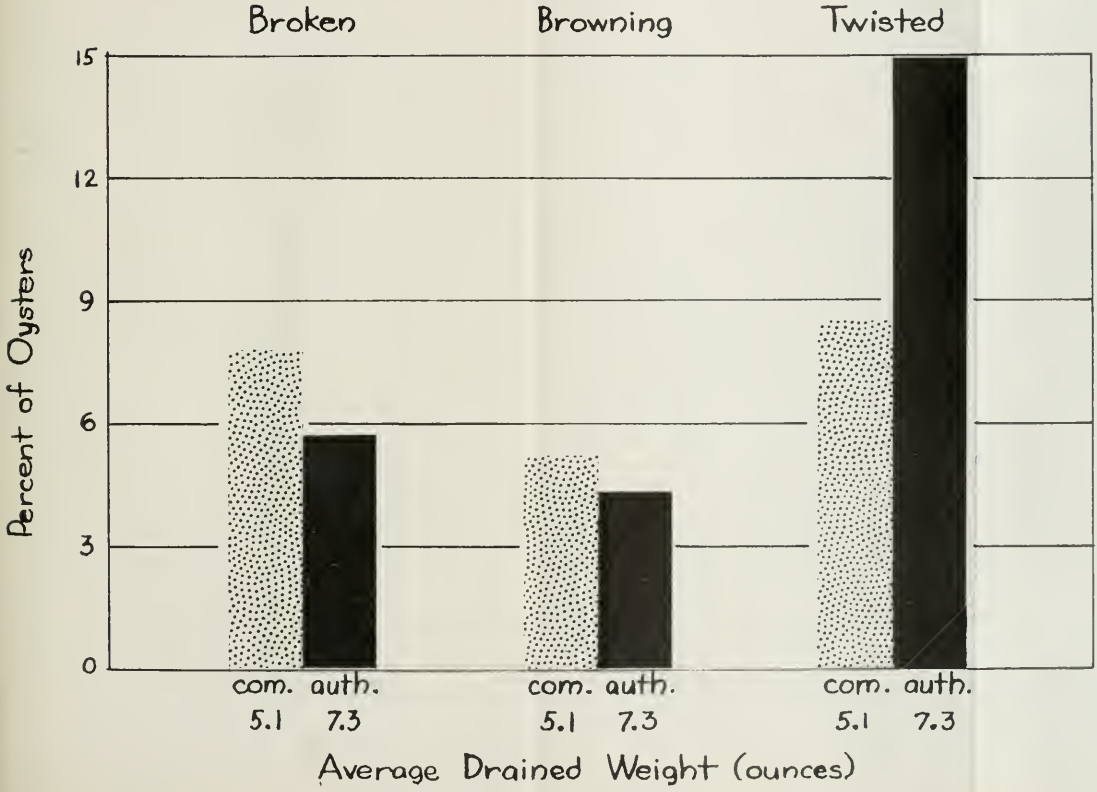


APPENDIX C

CANNED PACIFIC OYSTERS ~ COMMERCIAL AND AUTHENTIC PACKS (BLANCHED) JUNE 1948 ~ DATA FROM EXHIBIT 33



CANNED PACIFIC OYSTERS ~ COMMERCIAL AND AUTHENTIC PACKS (BLANCHED) JUNE 1948 ~ DATA FROM EXHIBIT 33